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SPEECHES OF

JOHN C. SATTERFIELD

PRESIDENT

AMERICAN BAR ASSOCIATION

1961-1962

VOLUME XXXV NUMBER 2

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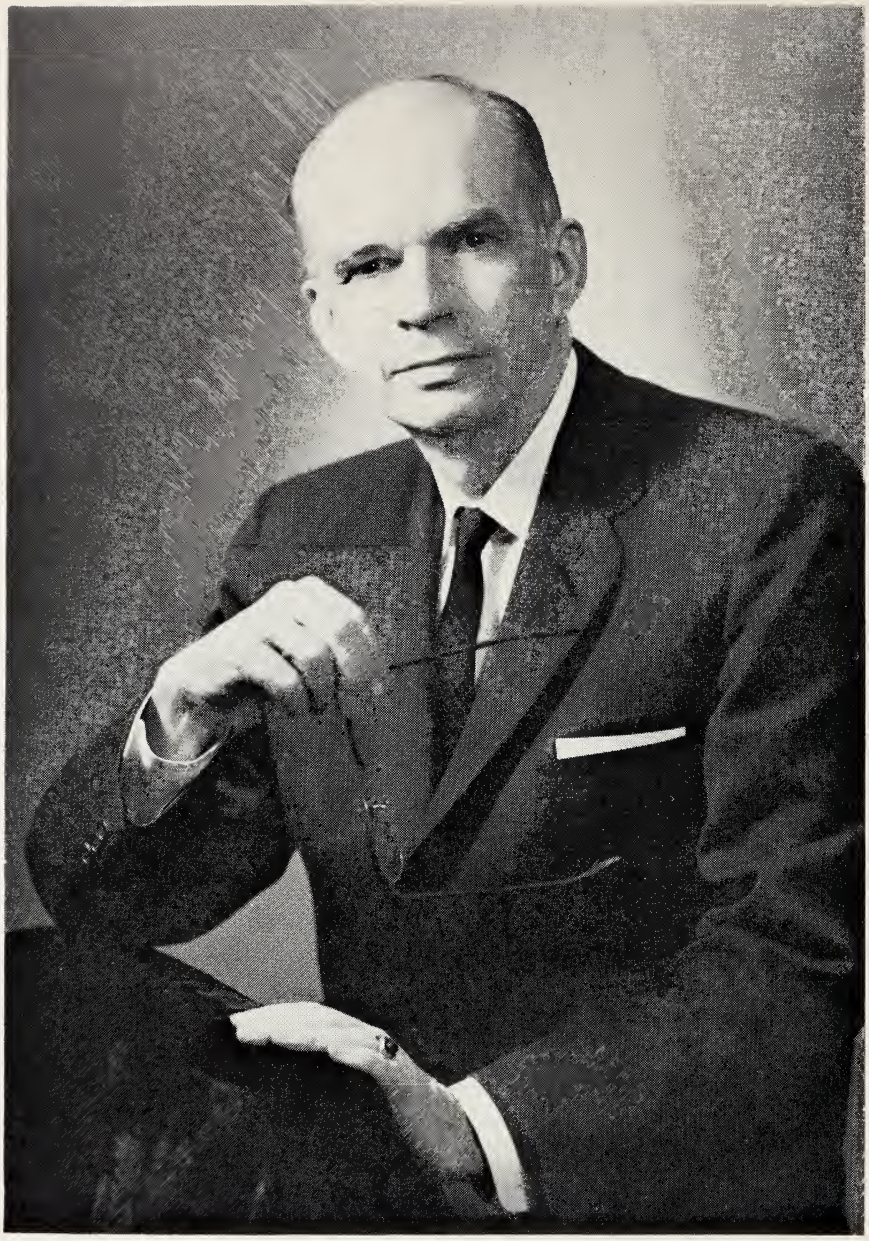

JOHN C. SATTERFIELD

President American Bar Association 1961-1962

FOREWORD

The Law School of the University of Mississippi and the State Bar are to be commended for the publication of this compilation of addresses by the Hon. John C. Satterfield, distinguished lawyer and first member of the Bar of Mississippi to serve as President of the American Bar Association.

It gives me pleasure to write this brief *Foreword,* as I have had the opportunity of knowing and working with Mr. Satterfield for many years through the ABA. During his Presidency, it was my privilege to serve as Chairman of two committees of the Association, and I know from first hand experience how closely and helpfully he worked with all of the committees and sections of the ABA.

The quality of Mr. Satterfield's leadership and his contributions to the organized bar are indicated by the remarkable achievements of the ABA during his year as President. At the close of the 85th Annual Meeting, on August 10, 1962, the Association's membership had reached a new peak figure of 112,390. This was a net gain of more than 10,000 new members for the year, and represented the largest membership advance in one year ever experienced by the Association except during 1956.

In the area of public service, President Satterfield took the lead in organizing the Joint Committee for the Effective Administration of Justice made up of twenty-one representatives from the Bench, Bar, law faculties and seventeen cooperating organizations. This Committee, under the Chairmanship of Associate Justice Tom C. Clark, launched a three year program entitled "Project Effective Justice" to improve administrative standards and procedures of state trial courts throughout the nation. Extraordinary progress was made during the first year, with eight seminars being held for trial judges covering a total of seventeen states.

Another public service program of the Bar, which received dynamic leadership from President Satterfield, related to the Communist threat. The ABA had two committees with responsibility in this area, namely, the Standing Committee on Communist Tactics, Strategy and Objectives, and a new special committee (organized in February 1961) to encourage and support educational authorities in teaching the facts about Communism and its contrast with liberty under law. Realizing that the effectiveness of these committees required and merited foundation support, President Satterfield led efforts which resulted in substantial grants from major foundations. On the basis of his recommendation, the two committees were consolidated into a new standing Committee on Education Against Communism, which has since carried forward and expanded this important educational work. In all of this, it was wisely recognized that the primary responsibility is necessarily and properly upon the educational authorities at all levels. But it was the view of President Satterfield, the House of Delegates and the Asso-

ciation Committee that the encouragement and affirmative support of responsible organizations such as the ABA, with its special duty to defend the rule of law, would materially assist in encouraging the quality of education in depth which is so necessary to a broader understanding of the Communist challenge to our country and to freedom everywhere.

No comment on John C. Satterfield's contributions to the organized bar could fail to mention his deep interest in improving the economic status of the legal profession. He was Chairman of the Association's Committee on the Economics of the Law Practice for three fruitful years. A series of basic pamphlets were written (in part by Mr. Satterfield personally) and widely disseminated to ABA members throughout the country. These, together with countless speeches, served to alert the profession to some of its basic economic problems, and pointed the way for overdue improvements in law office management and procedures.

During his year as President, and largely as the result of his inspiration and determination, the *Lawyer's Handbook* was published by the Association. This book, prepared in cooperation with the American Law Institute and the State Bar of California's Continuing Education of the Bar Committee, is a thorough manual on law office practice and procedure, and it immediately became a legal "best seller."

It would not be appropriate, in a brief foreword, to deal at greater length with the accomplishments of the ABA under President Satterfield. Suffice it to say, that there was real progress in many other areas both of public service and professional activities, including (1) three continental conferences of lawyers in support of the ABA's program of World Peace Through Law, (2) the authorization of a state by state survey of the present posture of indigents' defense, (3) the holding of an unprecedented national coordinating conference on unauthorized practice, (4) the initiation of a lawyer placement information service at the American Bar Center, and (5) the organization of a new Section of General Practice.

Mr. Satterfield would be the last to suggest that he made any special contribution, above and beyond what would normally be expected of the Association's President, to any of the foregoing accomplishments. But the fact remains that during his Presidency, the ABA had a year of truly extraordinary achievement, with major forward strides in various areas. Mr. Satterfield's vision, determination and indefatigable efforts contributed materially to all of these. The fellow lawyers of his state have every reason to take pride in these achievements, and it is hoped that the publication of these addresses will serve as an appropriate reminder of John C. Satterfield's dedicated service to his profession.

Lewis F. Powell, Jr.
President Elect
American Bar Association

WORLD PEACE THROUGH LAW*

I. Introduction

The interdependence of all nations is now a basic fact of international life. This interdependence has been manifested by rapid strides in the development of international communications, trade, and international cooperation for economic development. Concomitantly, increasing interdependence has created demands for an international legal regime which will protect the resultant newly created international institutions as well as guarantee the integrity of states and protect the freedom of the individual. Without such a regime, mankind's primary concern must be with problems of security, rather than with constructive programs of progressive economic, social and political development.

One of the inevitably salutary consequences of these Continental Conferences will be the acquisition of a much wider understanding of the contribution in this field which has been made by distinguished jurists and lawyers from every area of the world. The great principles underlying the concept of international law reflect truly universal concepts held by representatives of every continent, and of ancient as well as modern civilizations; and this area of common principles is broad enough, despite the existing differences in our national legal systems, to form a solid base upon which we may build soundly toward an ultimate edifice of world law which may shelter the nations and the people of the earth forever from the fear and the threat of war as a means of settlement of international disputes.

II. Economic, Social and Political Change

The burgeoning nationalism of newly independent nations asserting their sovereignty, coupled with the rising expectations of the peoples of these nations for a greater share of the material wealth of the world and for greater individual freedom, has placed enormous strains upon the framework of international society. Legitimate demands are being made for an international legal regime which will aid in maintaining the integrity of states and thereby protect the freedom of the individual and permit an equitable enjoyment by each human being of the fruits of his labor. But to meet these demands will require great international advances—socially, politically, economically and in the field of world law. The interrelationship of these factors must be understood and emphasized; for continuous and lasting social, political and economic progress is impossible without an adequate international legal frame-

*This manuscript was used as the basis of the address by John C. Satterfield when President Elect of the American Bar Association before the Americas Conference on World Peace Through Law held in San Juan, Costa Rica, and as the basis of addresses when President of the American Bar Association before the Asian and Australian Conference held at Tokyo, Japan, the African and Middle East Conference held at Lagos, Nigeria, and the European Conference held at Rome, Italy.

work designed to encourage and protect the institutions essential to such progress.

Consequently, although the basic principles of international law are founded upon the fundamental ideas of many national legal systems of law, these principles and the rules derived from them are being re-examined to determine where they may be adequate to meet the fresh demands of our reconstituted international society.

III. Law and Force

Lawyers, knowing through their own experience that the rule of law is the only effective alternative to naked power and brute force as the basis for organization of domestic society, cannot concede that a realm of order and tranquility on the international level is not possible through utilization of the principles, procedures and institutions of law. So there is and can be no disagreement among lawyers of good will as to the absolute necessity of the international rule of law.

Down through all the ages nations feeling themselves wronged have relied, as did tribes of pre-history, on armed force, either real or threatened, to secure what they believed to be their rights. Now, however, with the United Nations Charter properly denying nations the right to use force, yet failing to provide an obligatory means of resolving international disputes, an intolerable situation has been created. It is asking the impossible of human nature to expect that an aggrieved party —either an individual or a nation—will not seek self-enforcement of asserted rights if the community provides no alternative. Thus wars begin. Therein lies the gap in the framework of international law which in turn has led to feuds and wars throughout recorded time. And there, today, lies the root of a potential world conflict which could destroy civilization as we know it.

IV. Avoiding Atomic Devastation

Faced with the possibility of devastation by atomic war if no peaceful method is found by which the legitimate aspirations of nations can be realized and their differences peacefully resolved when these aspirations conflict, lawyers have a clear obligation to their profession, to their respective nations, and to mankind; an obligation to apply their talents and ingenuity to create on an international scale a legal framework similar to that which has been demonstrably effective on the domestic level. Lawyers cannot, in good conscience, accept the inhibition in the view that policy is no concern of theirs, nor the restriction in the assertion that their only function is to provide the legal justification for the decisions of others. The lawyer's professional allegiance is to an evolving legal structure meeting the constantly shifting and growing demands of an ever-changing society composed of a variety of differing political,

economic and cultural interests; and this need conflict in no way with his national allegiance as a citizen of his country.

I sincerely believe that the peoples of the world do not want war. Yet unless they act to develop their institutions beyond the national level so that war is an impossibility and so that tensions and conflicts between nations can be controlled and peacefully resolved, there is no doubt that the world will find itself at war.

Thus our program must arouse the peoples of the world to the urgent need for the international rule of law. We must work for the collective establishment of those legal institutions which can be substituted for military institutions. We must labor to make war an impossibility by destroying its primary cause; that is—*the lack of effective international machinery for the settlement of international disputes.* The organization, leadership and manpower for such a gigantic program must come from lawyers. We must act collectively and in a spirit of good will dedicated to our cause and aware of its responsibilities. The rule of law provides mankind with hope for the future, and only such hope can provide the strength and courage necessary to maintain our equilibrium in a world constantly torn by dissension and threats of nuclear annihilation.

We all understand that there are many persuasive reasons for caution in accepting obligations imposed by an external or international institution or in delegating authority to those institutions to regulate matters which affect the security interests of a nation. But we shall only compound our problem by permitting unfounded fears or ignorance to reduce legitimate proposals designed to bring a greater measure of law to the world community to the lowest level of acceptability within every nation.

We also recognize that the sources of international law are greatly varied and properly represent different cultures and philosophies. We may recall that one of the most important sources of international law cited in the Statute of the International Court of Justice is the "general principles of international law recognized by civilized nations." The Romanist and common law traditions are valuable sources of international law, as are the great traditions and principles of Islamic, Hindu, Chinese, Japanese, and other important legal systems. Therefore the consensus upon which international law must be based necessarily represents the ultimate conclusions common to a variety of philosophies regarding the basic needs of peoples of all nations.

There can be no permanent peace without law and an international judicial organization. This fact has been demonstrated time and time again throughout history. If we are to survive in our modern society and reap the benefits of an advanced civilization, we must do for international society what has been done for domestic society. We must make settlements of disputes by force impossible and unthinkable. In order

to do that, we must provide institutions which will replace the need for policies and national armies geared exclusively for protection of the national interest. We must replace the machinery for war with the machinery for peace. Machinery for peace has traditionally been and will continue to be built upon the rule of law.

The end result must not be that of any particular political system or civilization. It must be truly representative of the best in every political system, every culture and society. That is not to say that in developing this system all the vast differences between the nations and peoples of the world will be resolved; on the contrary, the political problems which divide east and west, north and south, socialist and capitalist, and others, from one another, obviously will continue to exist. No single stroke of genius or series of resolutions will solve these problems. However, we, as lawyers, can by virtue of our training and experience define an international legal system which can accommodate these great differences between nations, just as domestic legal systems accommodate the tremendous complex of competing interests found within modern domestic societies. Indeed, if there were no conflict, I doubt if a legal system would be necessary. The rule of law is a concept which can be equally shared by civilizations throughout the world and which will not necessarily erase political differences, but will assure that these differences do not erupt into self-destructive wars.

V. Law's Function

The function of law is twofold: (1) to create conditions in which each member of the community of nations can perform its role of allowing man to develop fully his potentialities in freedom, and (2) to provide an objective standard by which his rights and obligations in respect to his fellow man and his state can be determined. Without an adequate body of law binding on the state, the rights of individuals are subject to the caprice of those who wield political power. Only the rule of law can provide superior conditions for maintenance of peace and order, the protection of personal liberty, the regulation of economic activity in the common interest, and the just settlement of conflicting claims. Only the rule of law can provide a satisfactory framework for orderly social, economic and political evolution. For these purposes governments under law are created.

This is the highest function or role of law. In a democratic society, a body of rules for human conduct derived from the common consent of the community, and enforced through institutions and procedures authorized and created by the community, is the means of achieving the rule of law. Law which reflects the consensus of the community as to the means which are right and just, and which is efficient in securing its legitimate aims, should represent the highest in human nature. Law

at its best is the "range of presuppositions on which government is conducted—not the technical doctrine of judicial authority."

VI. Citizen Responsibility

Under the rule of law the social responsibility of the citizen is never overlooked. As the source of the law, he has a grave responsibility. As a beneficiary of the law, which guarantees his own rights, he has obligations to other members of his society not to infringe their rights, and to conduct his life in a way which will not demean his status as a human being entitled to the respect and freedom he expects to receive from others.

The great jurist Andres Bello defined international law as

> . . . nothing more than natural law, that applied to nations considers the human species spread over the face of the earth as a grand society of which each nation is a member, and in which each nation has for the others the same duties and obligations that the individuals of the human species have among themselves.

VII. Rights and Obligations

Accordingly, states demanding rights as equal members of the international community must remember that rights are received only as obligations are undertaken; that the invaluable freedom necessary for development of the particular state depends upon reciprocal respect for the freedom of other states; that the freedom of a state must not be perverted to deny fundamental rights to the individual; and that the legality of any action of a state affecting the welfare of other nations is determined by international law. Absolute freedom of action for the state is similar to absolute freedom for the individual. In both instances the result is anarchy, conflict, and ultimately destruction. New states, jealous of their recently acquired independence, and old states jealous of their power, would do well to remember this. They would do well also to remember that, in today's shrunken world, differences between small states can trigger a nuclear war as easily as disputes between great powers.

VIII. Public Opinion

Necessary to the formation of a responsible consensus on the rule of international law is a well informed public. Not just the members of our profession, but laymen as well, must have knowledge of what international law has been, and what it can reasonably expect to become, as well as the problems with which it must deal. They must see clearly what it can do for the world. A program to provide this knowledge need not be dramatic; indeed, if it were over-dramatized, if false hopes

were raised, there would be great danger of disillusionment leading to rejection of what ultimately can be the only solution to enduring peace.

IX. Crises Overemphasized

In domestic societies the layman all too frequently ignores the quiet "behind the scenes role played by law and lawyers in preserving tranquility in the society," but is aroused by the sensational trial of a master criminal, or a *cause celebre*. Similarly, in international affairs, attention is too often focused on the great crises such as those posed in the Congo, Berlin, or Laos, rather than on the day-to-day practice of adherence by states to prescribed rules of international law and international custom.

Yet recent developments in international law show the current trend to be away from all-embracing international agreements relating to the settlement of crises, and towards agreements in specific limited areas of common concern, such as in commercial and cultural relations.

This tendency toward international agreement on specified subjects reflects the elements of everyday life on the international level. If greater attention were placed on these less sensational everyday functions of law in the ordinary business of the international community, such as shipping, economic affairs, diplomatic relations, international trade and international communications, the world would be much closer to the international rule of law.

Obviously differences of opinion as to the best procedure to follow will exist and it is for that reason we are proceeding by holding these initial planning conferences. The committees of representative lawyers from every continent and every legal system will lay the groundwork for resolution of these problems at the proposed world conference of lawyers. It is at the World Conference that the final plan will be developed and the groundwork laid for execution of this "program for peace." Thus our immediate task is not to resolve the many political, economic and social issues which divide the world today, but to lay the foundation for the development of the necessary institutions and procedures whereby these issues may be peacefully resolved so that man may use the great potential of our times for constructive rather than destructive purposes. Thus, the World Peace Through Law Institute, when established, will not replace or otherwise reduce the importance of existing institutes and organizations. It will cooperate with them and supplement and coordinate their efforts.

X. Apathy and Cynicism

One of the most frightening characteristics of our modern society is its apathy and cynicism to the great issues which are a constant source of conflict between nations, and its fatalistic and resigned attitude to-

wards the prospect of war. Too often we hear the cliche: "There has always been war, and there will always be war." At risk of being overdramatic, I ask—what more can be said, what evidence must be presented, what more can be done to demonstrate that the next war will be the end of civilization as we know it? Must we go through Armageddon to realize that total destruction is not a remote prospect, but an immediate threat? We must say—"Never again will nations go to war with each other." And we must henceforth so act that this glorious assertion becomes a reality.

World Peace Through Law is not a slogan of visionaries and idealists; it is the cherished objective of the realist. It is the program of all those interested in a life free of fear, in a life dedicated to the development of the individual rather than his destruction, in a life dedicated to securing the advantages of economic progress, rather than the poverty of economic waste. What is more realistic and practical than the desire for survival? What effort is more worthwhile than that of mobilization for peace, rather than for war?

XI. A Towering Goal

It must be our great task, our overwhelming responsibility as lawyers dedicated to the rule of law, to remove that apathy which stifles hopes for progress and to initiate a program designed to achieve our common objectives.

This Conference should therefore undertake its task dedicated not to any particular legal, political or economic philosophy or doctrine, but to the towering goal of securing justice for all among all nations in order that through the rule of law man may attain to the highest good of which he is capable, and ascend to that high plateau of permanent peace and freedom which, with the help of God, is his destiny.

THE STATES WILL NEVER DIE— THEY ONLY FADE AWAY*

I. Will the Federal System Become a Central Government?

The balance of power as far as the nation and the states are concerned continues to shift, and to shift in favor of the central government. The shift is sometimes characterized by an almost glacierlike slowness, and at other times appears to us to be moving with the speed and power of an avalanche; but, whether turtle or hare, it continues. We are witnessing, and have witnessed for some decades now, what has been called a constitutional revolution, a revolution in which the facade of the federal structure may appear, to the superficial observer, untouched, even while it totters. Mr. Chief Justice Fuller once wrote: ". . . as long ago observed, it is with governments as with religions, the form may survive the substance of the faith."[1] The moral to be drawn from these words deserves careful attention on our part. For while we all continue, on historic occasions particularly, to echo the thoughts expressed in 1869 by Mr. Chief Justice Chase in *Texas v. White*,[2] the reality about which we speak here bears less and less resemblance to the words we use in order to describe it. I have no doubt that you remember something of the substance of his remarks in that case, but let me renew your acquaintance with some of the exact words:

> But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each state retained its sovereignty, freedom and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people . . . . Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their Union under the Constitution, but it may not unreasonably be said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.[3]

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*This article is taken from an address by John C. Satterfield to the Commercial Law League of America, Saranac, New York, July 3, 1961, and delivered at the Southeastern Regional Meeting of the Council of State Governments at Biloxi, Mississippi, July 27, 1962.

[1]Lottery Case, 188 U.S. 321, 375 (1903).

[2]Texas v. White, 74 U.S. (7 Wall.) 700 (1869).

[3]*Id.* at 1091.

"An indestructible union composed of indestructible states." A noble vision; a vision that, until quite recently, had seemed to guide our practice as a self-governing people. One would be hard pressed, however, to defend the thesis that it continues to serve as our guide in practice. As Professor Henkin of the University of Pennsylvania Law School has observed, "Constitutionally, our federal government continues to become a national government."[4] Professor Bernard Schwartz of the New York University Law School, in commenting on much the same trend, had this to say in 1957:

> In contemporary America, as in Benthamite Britain, the great instrument of government intervention has been statute law enacted by the national legislature. More and more, acts of the Congress have been asserting its control over matters formerly deemed to be beyond the scope of federal government authority. But, as has already been emphasized, these magnifications of national authority have not met with any check from that tribunal, that in our system was designed to hold the constitutional balance. On the contrary, the growth in Congressional pretentions to power has been accompanied by a drastic decline in the Supreme Court as a restraining organ. The consequence has, not unnaturally, been a decided trend in our system in the direction of federal predominance. In governmental, as in physical science, power abhors a vacuum. It is hardly surprising, therefore, that Congressional assertions of authority have rushed in to fill the space left vacant by post-1937 judicial abnegation. Nor can it be denied that the resultant increase in the authority of the Federal government has meant a basic shift in our constitutional center of gravity. Their fear of inordinate governmental authority led the draftsmen of the Constitution to emphasize the division of political power as its predominant characteristic. Power was parceled out between the Nation and the states. The authority reserved to the latter was to check the overaggrandisement of that vested in the center. The growth of Congressional authority in the past two decades has, however, basically altered the balance between states and Nation. *Intervention by Washington in matters that were formerly deemed to be purely within local competence has, indeed, become so frequent that many wonder whether the states are not doomed to become mere vestigal survivals of a formerly flourishing federal system.*[5] (Emphasis added.)

Now in a sense, all these matters are obvious. You have heard similar comments before. But, as Mr. Justice Holmes observed some years ago, we need to pay more attention to the obvious than to the obscure. We need to recall the incident related by the Greeks of the philosopher who

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[4]Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 645 (1961).

[5]SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT (1957).

was so busy observing, and speculating about, the mysteries of the universe and the heavens above that he neglected what lay at his feet, and fell, as a result of this, into a rather large hole. We need, in short, to reflect upon the constitutional changes which are taking place around us, to observe them and to consider their impact on the nation's future, our future and our children's future.

The factors underlying this shift in power are numerous. We would be foolish to think, as some do, that this can be explained simply in terms of ambition upon the part of power-hungry individuals in the nation's capital. Life, whether it be the life of a single individual or the life of an entire people, is not to be explained, or dealt with, in terms of a single causal chain. It is much too complex. In a sense this is unfortunate, for it means that we cannot, as some would, let the matter rest with a few glib generalizations, or connect these developments, as some would, with the presence of one or two convenient scapegoats. We must, as sensible people, see the world as it is, in all of its complexity, rather than as we would prefer to see it, in terms of relative simplicity.

This complexity is suggested throughout the 1955 report submitted to the President by the Commission on Intergovernmental Relations, one of the most valuable pieces of literature on this subject now available. The Commission, chaired by Mayer Kestnbaum, was established by Congress with a view to, among other things, study "the proper role of the Federal Government in relation to the States and their political subdivisions."[6] Its subject matter generally was the state of the federal union in the modern world, a world which is, in many vital respects, quite unlike that world with which the framers of the Constitution were familiar in 1787. The Commission sought, throughout its investigations, to understand the impact of modernity on the nature and workings of the federal system. Its report suggests that it was guided by the wisdom present in one of Woodrow Wilson's observations on this point: "The question of the relation of the states to the federal government is the cardinal question of our constitutional system. It cannot be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question." In review of the evolution of the federal system in the United States, the Commission was quite careful to point out the impact of what is called the "changing environment" of federalism. In its words: "A realistic view of the prospects for a continuing federal balance compels notice of the changes that have come over our society since 1787. The changes have been

[6]For a full list of the Commission's objectives, see COMMISSION ON INTERGOVERNMENTAL RELATIONS, A REPORT TO THE PRESIDENT (June, 1955), Appendix A (hereinafter cited as REPORT).

physical, technological, economic, cultural, intellectual and political."[7] It then went on to detail the impact of the growth in population, the effects of industrialization and urbanization, the revolution in agriculture, transportation and communications, as well as the changes in social outlook characteristic of a good part of the population. The impact of a series of crises, both economic and military, as well as our continued engagement in the maneuvers of the Cold War received attention. In short, the Commission sought a realistic and well-balanced, rather than doctrinaire, picture of the factors which seem to underlie the "great expansion in the National Government and its activities, in the proportion of national income passing through the Treasury, and in the degree of attention focused on Washington."[8] We are clearly indebted to the Commission for the spirit of moderation which ran through the report, as well as for the wealth of factual information present in it.

My comments today are addressed in large measure to the Commission's observations in regard to the "greater expansion of the National Government and its activities, in the proportion of national income passing through the Treasury, and in the degree of attention focused on Washington." The truth of the observation is inescapable; it permeates practically every page of the Commission's report. It has been emphasized and re-emphasized by a host of independent studies.[9] It has been confirmed by those who have taken the time to pore over the voluminous statistics released by the agencies of the government as well as by private groups.

It is possible, of course, to disagree about the desirability or undesirability of this development. As the Commission emphasized at the very beginning of its report, "problems of intergovernmental relations, by their very nature, involve fundamental issues of policy and philosophy."[10] My point is, initially, that whether we favor or oppose the trend, we must recognize its existence. We must have the facts. We must begin on a common ground. I personally regard these developments as extremely dangerous, and I shall try in these remarks to indicate some of the reasons why I feel them to be so. Your task is to evaluate the soundness of my reasons. But our mutual task, at the very beginning, is to grasp hold of the facts themselves, and to move from them.

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[7] *Id.* at 12. For a further discussion along this same line, see ANDERSON, INTERGOVERNMENTAL RELATIONS IN REVIEW (1960), especially ch. 2, *The Changing Scene and the American Federal System.* See also WHITE, THE STATES AND THE NATION (1953), especially Ch. 1, *The March of Power to Washington.*

[8] REPORT, *op. cit. supra* note 6, at 13.

[9] See, *e.g.*, the ANDERSON and WHITE studies cited *supra* note 7.

[10] REPORT, *op. cit. supra* note 6, at ix.

II. Will the Federal Government Take it All?

What are the relevant facts? Let me begin with, and perhaps focus upon, what I feel to be one of the most important facts—the control of the purse. It has been suggested that "whoever controls the 'purse strings' controls the government." Our own experience suggests as much. The experience of other nations on this point is also instructive. We might turn for a moment to examine certain developments in the English experience. In England in 1250 all governmental power (other than that of minor local governmental units) was vested in the King. In 1254 there was urgent need on the part of the king for more money than the sources of his revenue could provide. The King being absent from England, the Queen and the Earl of Cornwall, acting for the King, directed the sheriffs "that you cause to come before the council of Westminster two lawful and discreet knights from each County chosen by the people of the Counties, who shall arrange what aid they will pay to us in our need." This was the first exercise of the money power.

Eleven years after this, in 1265, Simon de Montfort, Earl of Leicester, sent a commission to the sheriffs to summon two knights from each shire, two citizens from each city, and two burgesses from each borough to meet for a conference. In this meeting the commonality of the people was represented. These representatives were not summoned so that they might become a part of the central government, but solely for the purpose of augmenting the central treasury. I will not take your time to review the manner in which, through the years, these relatively primitive arrangements gradually became formalized, or the way in which the House of Commons gradually emerged as a part of the legislative branch of the central government—not because of, but in spite of, the King's desires.

It is sufficient to note that it did, and that it came to play, and continues to play, an extremely significant role. As the central government became more and more dependent upon the grants of money which the House of Commons voted on behalf of the people, the House of Commons acquired more and more control in the central government, to the point at which, for example, it began tapping the sources of the King's independent revenue and channeling that money, as well as other moneys, to the King through the House of Commons. The King's dependence on the favor, or support, of the House of Commons increased accordingly. In time, the House, by that and other procedures, established absolute control over all "money-bills," taxation, and appropriation. As the House tightened its grip on the purse strings, it demonstrated the power of that control. This is a vastly important fact as far as the determination of governmental policy is concerned. Whoever controls the purse strings has the power to control that which is dependent upon contributions from the purse.

Along somewhat different lines we are now seeing the same basic principle at work in our own country. As the dependence of our states, small units of government, individual businesses and individuals upon contributions from the federal government is increased, the federal government by increased taxation is more and more tapping the sources of the independent revenue for the States. Proportionately as their dependence is increased, each dollar which goes into the States from the Federal Treasury is more and more loaded with federal power. As was demonstrated in England, we are demonstrating in this country that "whoever controls the purse strings controls the Government."

Unfortunately, however, there is this tremendously important difference insofar as the future of democratic government is concerned. Control of the purse strings during the thirteenth century was used by the House of Commons to *decentralize* governmental power. That control is now being used in this country to *centralize* governmental control, shifting governmental power from the states and concentrating it in what is rapidly becoming a great federal bureaucracy, impossible of democratic control. There seems to be little doubt that the federal bureaucracy is to become even larger in the future.[11]

In concentrating upon the external threat posed by Communism in recent years, we have quite often neglected these trends. As the Honorable Samuel B. Pettengill recently pointed out:

> The threat of Communist military aggression has for some years put the more subtle danger of Socialism in the shade. Most people identify Socialism as government ownership of the titles to property. Although the federal government owns more than a fifth of the land area of continental United States and runs scores of businesses in competition with its taxpayers, the man of the street does not really think the government will actually seize farms, factories or stores.
>
> Hence he overlooks the fact that the socialization of income by taxes can achieve practically the same result as the actual expropriation of property titles. This theme needs examination and documentation from all angles.
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> This is another equally dangerous trend—the swallowing up of the states by the Octopus on the Potomac. In short, not only do we see the growth of Socialism via taxation, but the

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[11]See, *e.g.*, 108 CONG. REC. 11308 (daily ed. June 28, 1962):

They have added 101,115 new bureaucrats to the public payroll during the first 16 months this administration has been in office. Since January 21, when the new administration took office, it has been adding new employees—not replacements of Republicans with Democrats, but new employees over and above the numbers employed in the same agencies in preceding years—at the rate of 6,300 a month, or approximately 1,500 new employees every week; and on the basis of the Government's 5-day workweek, that means 300 new employees every day, or, in short, it means that every 2 minutes of a working day the administration is adding one new Federal employee to the payroll. (Senator Williams of Delaware, addressing the Senate.)

> slow death of a principal segment of our constitutional form of government and dispersion of political powers between the nation, the states and their towns and cities. The court house and city hall are being moved to Washington.[12]

We have no one to blame but ourselves for the deadly and devastating movement that socialism has made toward transforming our form of government from a democracy into a centralized socialistic autocracy —a movement which has already taken us almost beyond the point of no return. This has happened since almost everyone here was old enough to vote—most of it during the last quarter century. Let us turn back to the year that I graduated from Law School at the University of Mississippi—the year 1929. My figures are taken from data compiled by the Bureau of the Census.

In 1929 the total Federal Governmental expenditures stood at slightly more than $3 billion. By 1940 this had risen to $9 billion; by 1950 to nearly $40 billion; by 1960 it was in excess of $76 billion.[13] It continues to rise. Over $81 billion was spent in 1961, over $87 billion in 1962. According to the figures released by the Bureau of the Budget, the anticipated expenditures in 1963 are in excess of $92 billion.[14] This is probably a conservative estimate.

The character of the present trend has been illustrated by Senator Carlson of Kansas in the following way:

> When we consider past developments . . . that in 1912 the Federal Government spent $7 for each man, woman and child in the country, but in 1960 spent $460, and if we follow through with the 1963 budget, we will be spending $516 for each person in the country, it is obvious that at the present time the Government is taking from the people, and spending 73 times as much, per person, as it did a short 50 years ago.[15]

There is no reason to believe that the trend will be reversed in the future.

For the same general period we have been discussing, that is, 1930 to 1960, state and local expenditures increased from about $8 billion in 1930 to about $61 billion in 1960.[16] Putting it another way, between 1930 and 1960 state and local spending increased over seven-fold while federal spending multiplied over 25 times. Even if military expenditures

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[12]Address by Samuel B. Pettengill, Legal Department, Pure Oil Company, at the Annual Tax Forum of Mid-Continent Oil and Gas Association, June 1, 1955.

[13]U. S. BUREAU OF CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957 (1960) (hereinafter cited as HISTORICAL STATISTICS); U. S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (82nd ed. 1961).

[14]U. S. BUREAU OF THE BUDGET, THE BUDGET IN BRIEF FOR THE FISCAL YEAR ENDING JUNE 30, 1963, 49 (1962).

[15]108 CONG. REC. 111319 (daily ed. June 28, 1962).

[16]U. S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS, *op. cit. supra* note 13 (Series Y536); U. S. BUREAU OF THE CENSUS, GOVERNMENTAL FINANCE IN 1960, 3 (Sept. 19, 1961) (hereinafter cited as GOVERNMENTAL FINANCE).

were excluded at these dates, for the purpose of the calculation, federal spending has still grown twelve times as large in this thirty-year period.

Now I realize full well that this is an oversimplification and, in some degree, an overstatement. But even if adjustments are made for the population increases of the last 30 years (up 45 per cent) and changes in the value of the dollar (down 43 per cent), the trendline of per capita spending in uniform dollars is up 845 per cent at the federal level for this period as compared to 160 per cent at state-local levels.

Spending that was not covered by borrowing obviously was financed through taxes. Taken together, federal, state and local taxes are now consuming about 25 per cent of our gross national product. In 1930 they took 12 per cent. That's a fair measure of the growing impact of government on the national economy. If the same trend is followed in the future (and there is nothing in the past thirty years to indicate that we will slow such trend—recent actions through our representatives in Congress indicate that this trend will accentuate rather than decline) then by 1990 one half of the gross national product would be required to pay the cost of government and by 2040 the entire gross national product would be consumed by one form or another of government activity. Complete socialization of every form of industry and commerce would be accomplished.

On the public debt side, the story is equally as grim. In 1930 the federal debt was about $16 billion. By 1940 it had risen to approximately $43 billion; by 1950 it was in excess of $257 billion, and by 1960 it was in excess of $286 billion.[17] It continues to rise. It is now in excess of $295 billion, according to a report submitted by Senator Harry Byrd, to the Senate, in June of 1962.[18] In a memorandum submitted to the Senate Finance Committee on January 8, 1962, the Treasury estimated that it would reach $307 billion within the year.[19] Only by the grace of quick legislative action has the Congress been able to legitimize this development. In 1961 the "temporary" statutory debt limit was $293 billion; in order to keep pace with the rising debt it was increased twice within a period of nine months, July 1961-March 1962. Quite recently Congress has acted a third time, this time raising the limit to $308 billion. In a period of twelve months, then, the limit has been raised three different times, and by a total of $15 billion. No doubt the Congress will be forced into the same kind of action at any number of points in the future. One Senator, in a facetious mood, suggested during the current debate on raising the limit the following potential solution to this problem: "I have wondered sometimes if we should not pass some kind of an elastic debt limit bill, providing that the debt limit shall always be

[17] HISTORICAL STATISTICS, *op. cit. supra* note 13 (Series Y386); GOVERNMENTAL FINANCES, *op. cit. supra* note 16, at 1.

[18] 108 CONG. REC. 8953 (daily ed. June 5, 1962).

[19] *Ibid.*

at least a billion dollars higher than the national debt on any given day."[20] In this same connection the Senator offered some valuable observations in regard to the cost of servicing this debt:

> The interest payments alone are $9 billion per year, an amount greater than the national debt of all but six countries; five in the free world, and Russia in the Communist bloc. This annual outlay for American taxpayers to merely service the debt is not a myth. The $9 billion service charge is larger than any of our total Federal budgets prior to 1941, except for fiscal 1919 at the end of World War I. The U. S. debt . . . represents nearly 60 per cent of the combined free world central government debt of $505 billion. We lead the world in debt.[21]

We have apparently abandoned the sound counsel of Alexander Hamilton, who argued that a national debt might have a number of useful characteristics, one of which was that it could help a nation to establish a credit rating by being paid off rapidly.[22]

Alarming as these facts about the current state of expenditures and outstanding debt are, we should not let them blind us to the fact that there are what might be called hidden costs as well, and that these also constitute a grave, and perhaps even graver, threat. I draw your attention to a statement released by Senator Byrd on May 30, 1962, a statement which is reprinted in the *Congressional Record* of June 5, 1962, and which deserves serious attention on our part. Senator Byrd begins his report with the following statement:

> The U. S. Government in fiscal year 1963, beginning July 1, will have current authority to obligate funds, outstanding Federal debt and other commitments of at least $1,242 billion.
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> This approaches $1¼ trillion, but it is far from a complete statement of the Government's actual and potential obligations because untold billions in commitments for future spending cannot be calculated.[23]

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[20] 108 CONG. REC. 11309 (daily ed. June 28, 1962) (Senator Bennett).

[21] *Ibid.*

[22] 108 CONG. REC. 11338 (daily ed. June 28, 1962); Senator Lausche, quoting from a manuscript prepared by the Brookings Institution, and entitled "The National Debt Ceiling":

> Historically, the Government has pursued a policy of relatively prompt reduction of the national debt. Alexander Hamilton, in the earliest days of the Republic, set the tone for future generations. He argued that a national debt has a number of useful attributes, but one of its foremost characteristics is that it could help a nation to establish its credit rating among the nations of the world—if the debt were paid off with promptness. Over the decades, the debt rose primarily during war and depression and fell largely in response to the basic philosophy that the national debt should be extinguished. Twenty-four years after the War of 1812, the debt was paid entirely off. In the 27 years after the Civil War, the debt was reduced by almost two-thirds; and in the 10 years after World War I the debt was reduced by one-third.

[23] 108 CONG. REC. 8951 (daily ed. June 5, 1962).

This is an astounding figure, and reminds one very much of the kind of games one used to play as a child, where all the children tried to think of the biggest possible number they could.

Senator Byrd breaks the preliminary figure down roughly as follows:

	Billion
Current authority to obligate, such as appropriations, balances, etc., estimated only through fiscal year 1963, beginning July 1, 1962	$188
Outstanding Federal debt in Treasury securities, etc., estimated as of the beginning of fiscal year 1963 on July 1, 1962	296
Promises to pay under contingencies specifically fixed in existing law, such as Federal insurance in force, guaranteed loans, etc.	338
Other, including such moral commitments as unfunded accrued liabilities of Federal trust funds, securities issued by Federal agencies in addition to the regular debt, etc.	420
	$1,242

Senator Byrd goes into some detail in connection with each of these categories in his report. As he emphasizes, there are "untold billions in commitments for future spending" which cannot be calculated, though certainly they cannot be ignored. In this connection he lists such things as (1) interest on the federal debt, (2) pensions, retirements, compensation, (3) grants to states, (4) major subsidies, (5) foreign aid, and (6) public works.

This aspect of the problem is often ignored, and yet we cannot afford to neglect it in thinking of the extent of our present commitments and present debt. The Federal Government is piling up C.O.D.'s for future redemption at an astounding and alarming pace. Our commitments for highway improvements, for public housing, for civil public works, for subsidies, for space exploration, run into the tens of billions.

If we limit our consideration to direct obligations of the United States, the picture is just as grim. As was said by John A. Beckett:

> Now if you take the 288 billion dollars of national debt, add the 100 billion of commitments we have made for going programs, and about 370 billion for retirement, pension and benefit programs, you come to the astronomical total of over 750 billion dollars—the size of our national mortgage in the future. This is not fancy, this is fact; a fact of federal fiscal life—albeit not a very widely recognized fact—with which it would serve more Americans to be familiar.[24]

[24]Address entitled "National Issues in the Budget of the United States" by John A. Beckett, Assistant Director, Bureau of Budget (undated).

Increases in the annual budget are just as alarming even if Congress were to add no new programs or increases to the President's budget; the level of federal spending is automatically going to go up. The increasingly expensive requirements of the existing programs alone will bring this about. The catalog of built-in increases covers such programs as outer space, civil aviation, public works, merchant shipping, urban renewal, science education, medical research, public assistance, loans to under-developed countries, and veterans' pensions. The farm program may become even more costly as time goes on, unless we find a solution to this problem that helps the farmer and frees him from controls at the same time.

Unfortunately, there are few built-in decreases, due to the fact that government programs once started, develop their own immunity to revision or curtailment. President Eisenhower, in a budget message, nominated eighteen programs as being ripe for revision in order to reduce future expenditures. Only three received attention by the Congress, with the net result of *increasing* future expenditures by about $9 billion, rather than decreasing them.

Worse still, pressures for new spending programs are increasing in intensity. A table in the *Congressional Record* showed that in the last session of the 86th Congress alone, twenty major spending bills in the Senate along with another twenty introduced in the House for new programs, priced out at roughly 300 billion dollars over an average period of five years. While there is some duplication among them, if these and other bills were passed as their sponsors wanted them, they would have added 50 or 60 billion dollars a year to our present spending. At the same time, there were bills to reduce taxes by 5 to 10 billion dollars a year. Senator Byrd's analysis of the fiscal situation of the United States offers additional evidence of this same tendency to increase expenditures. In his words:

> Some 200 actions and proposals involving new and increased Federal obligation of public money and credit can be documented in Presidential messages and communications to Congress during the current administration which began in January 1961.
>
> The budget document for fiscal year 1963 (pp. 118-266) and other official publications indicate that the administration expects numerically up to 95 per cent of its actions and proposals to have been implemented in some measure before the end of fiscal year 1963.[25]

The result of this can only be increased deficits, similar to, and probably exceeding that, which has been reported for the fiscal year just ending.

Of course, we are being told that a deficit means nothing; that, if

[25]CONG. REC. *op. cit. supra* note 23, at 8954.

anything, it is a desirable rather than undesirable thing. The administration has begun to speak in terms of "planned" deficits.[26] We are told that balanced budgets are unduly conservative and that the times called for "bolder" thinking. Apparently we are to borrow ourselves into prosperity, as strange as this may seem.

I acknowledge that I am unimpressed by this argument. For responsible fiscal policy, there is no acceptable alternative to conservatism. Anything else boils down to sheer speculation; and, in plainer language, that means gambling with the country's fiscal strength, which is essential to its security. This still leaves ample room to be dynamic, to take up new ideas, to move ahead as we can afford to do so.

I am amazed at times when I begin to reflect upon the individual's stake in all this. Let me quote an extract from a speech given by Senator Dirksen of Illinois in the course of the debate over the matter of extending the debt ceiling:

> I presume our first public debt was incurred right after the Revolution, at which time it was approximately $75 million. That was a very tolerable debt as debt goes today. But over the years that debt has gone up, both in terms of total and in per capital terms . . . . Back in 1789, when the war was over, the public debt was $16 per capita. In 1860, before we got into civil strife, it had gone down to $2.06 per capita. At the end of the Civil War it had gotten up to $75 per capita. Before World War I it had receded to $11.85. After World War I it got up to $228. After World War II it got up to $1,097 per capita.[27]

It has been estimated that the present speculative spending of the government saddles a federal bonded indebtedness of $6,500 upon every family in the United States; and that within 15 to 20 years, this amount will automatically increase to $21,500 per family. This is federal debt alone. It has also been estimated that to take care of the total public current annual expenditures it costs each family in the neighborhood of $2,260 per year.

III. Strangulation by Purse Strings

I have been talking thus far primarily of the socialization of the economy of the United States through the use of federal funds, and I have concentrated in the last few minutes upon the impact of this spending on the individual citizen. But I believe one must say something about the impact of these trends on the states. In 1932, the 48 state governments and 102,000 local governmental units (municipalities, county road districts, school districts, etc.) together received approximately 77 per cent of the public taxes paid; in 1942, this had diminished

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[26] See the discussion in 108 Cong. Rec. 11307 (daily ed. June 28, 1962).

[27] *Id.* at 11310.

to 42 per cent; and in 1950 it had dropped to 31 per cent. It continues to this date to fluctuate between 30 and 33 per cent.[28] With the growing competition for the tax dollar, however, and the superior resources available to the federal government, we may see a return to the earlier trend and worsening of the state's tax position vis-a-vis the central government. If the 30-year trend continues, the receipts of state and local governments will be reduced to 15 per cent by 1985 as compared to 77 per cent in 1932.

This decline in the state's share of the available tax dollar has been accompanied, in turn, by an increased reliance on the part of the state for assistance in the form of the federal grant-in-aid. Some of the strengths and weaknesses of the grant-in-aid in this connection have been discussed at some length in a series of reports—*e.g.*, the Report on Federal-State Relations prepared by the Council of State Governments for the Hoover Commission in 1949,[29] the Kestnbaum Report,[30] the report on Grants-in-Aid recently prepared by the Advisory Commission on Intergovernmental Relations.[31] I would like to quote in this same connection a short extract from an address by Dr. George S. C. Benson, who has served as Director of Research of the Commission on Intergovernmental Relations and as a consultant of the United States Department of Agriculture and the United States Bureau of the Budget:

> I propose to speak about the other great centralization of the last quarter century—through the use of the present unlimited view of federal expenditures power taken by the Supreme Court without regard for the Tenth Amendment, the federal government has established a network of grants-in-aid. These grants cover some 30 different fields, with 70 specific grants. In some way they are involved in all major expenditure fields of state and local government except public safety. In next year's budget the total of these grants is about 7 billion dollars. *They probably influence a quarter to a third of state budgets.* The fundamental policies they prescribe affect an even larger part of state activity.
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> If we are willing to turn over all governmental functions to one level of government, one group of individuals would have a measure of authority through government over a quarter of our economic activities. That group would also have a monopoly of the legal coercive power of our society.
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> Placing these great powers in the hands of a few citizens seems to me to be dangerous to our liberties. It is true that we have safeguards for our liberty built into the national Constitution

[28] HISTORICAL STATISTICS, *op. cit. supra* note 13 (Series Y386), at 448; GOVERNMENTAL FINANCES, *op. cit. supra* note 16, at 2.

[29] S. DOC. No. 81, 81st Cong., 1st Sess. (1949).

[30] *Supra*, note 6.

[31] COMMISSION ON INTERGOVERNMENTAL RELATIONS, PERIODIC CONGRESSIONAL REASSESSMENT OF FEDERAL GRANTS-IN-AID TO STATE AND LOCAL GOVERNMENTS (1961).

through the separation of powers and judicial review. It is true that to date we have not had in charge of affairs in Washington a group which wished to establish absolute authority for itself.

But it is also true that constitutional liberty is a precious thing which has been enjoyed by relatively few countries for relatively brief periods in human history. Events of the past half century have made it clear that liberty can disappear rapidly in countries which have cherished it for several decades or even longer. Mankind is turbulent and uncertain in its desires. *One should not lightly throw away the safegard of liberty which decentralization of government furnishes.*

. . . [W]e should resist further intrusion of the federal government into the financial affairs of the states. If the present trend continues long our "sovereign" states of yesteryear will have become mere administrative districts of the national government and America will have lost much of its rich tradition of decentralized government. I have a very definite feeling that the losses in citizen responsibility are very great, that a fundamental part of American institutions is disappearing before our eyes, with very little concern on our part. I am afraid that the American states have a future as a confused part of a great national bureaucracy.[32] (Emphasis added.)

This deadly attrition was foreseen by the men who founded this nation. Samuel Adams' fear expressed in 1789, that despotism would be revived in America through such developments, was put in these pertinent words:

I have always been apprehensive that through the weakness of the human mind often discovered even in the wisest and best of Men, or the perverseness of the interested and designing, in as well as out of Government; I was particularly afraid that unless great care should be taken to prevent it, the Constitution in the administration of it would gradually, but swiftly and imperceptibly run into a consolidated Government pervading and legislating through all the States, not for Federal purposes *only* as it professes, but in all cases whatsoever, such a government would soon totally annihilate the Sovereignty of the several States so necessary to the Support of the confederated Commonwealth, and sink both in despotism.[33]

Jefferson seems to have foreseen clearly the danger to individual liberty involved in this situation when he wrote in 1821:

When all government, domestic and foreign, in little as in great things shall be drawn to Washington as the centre of all power, it will render powerless the checks provided of one government on another, and will become as venal and oppressive as the government from which we separated. It will be as in

[32]Address by Dr. George S. C. Benson, President of Claremont Men's College, at the Annual Convention of the National Cottonseed Products Association, May 12, 1959.

[33]LONG, USURPERS—FOES OF FREE MAN 27 (1957).

> Europe, where every man must be either pike or gudgeon, hammer or anvil. If the States look with apathy on this silent descent of their government into the gulf which is to swallow all, we have only to weep over the human character formed uncontrollable but by a rod of iron, and the blasphemers of man, as uncapable of self-government become his true historians.[34]

This danger has been recognized by the great leaders of our nation throughout the years of its history. Woodrow Wilson said:

> The history of liberty is a history of the limitation of governmental power not the increase of it. When we resist therefore the concentration of power, we are resisting the processes of death, becaue a concentration of power is what always precedes the destruction of human liberty.[35]

The seriousness of our problem today is highlighted by the inactive and apparent lack of concern of our populace. For instance, there seems to be a general public apathy toward our high taxes. Perhaps one reason is that most Americans are unaware just how heavy their tax burdens have become compared to people in other countries. Our maximum federal tax rate of 91 per cent on personal incomes is the highest rate imposed by any central government in the world—and the steepness of our progressive income tax rate scale below the top rate is similarly oppressive.

From the standpoint of taxing corporate earnings, the United States, at 52 per cent has the third highest maximum rate among the free nations of the world. Yet, because of the very low dividend tax credit allowed the American taxpayer the effective tax burden on him is actually heavier than that on any of his counterparts.

When account is taken of all levels of taxation, it appears that the United States can lay claim to the highest personal income tax rate in the world. This is a curious position for a country that allegedly relies on individual initiative for progress.

Recognition of our tax situation is not cure of the disease, however. The piper must be paid. Our salvation from the potential mediocrity of centralized-socialized, autocratic-bureaucratic governmental dominance over the free will of the individual is in decrease of governmental expenditures and not by needlessly attacking the bill for those expenditures.

I would propose that we begin dealing with the problem of excessive expenditures in at least two ways. First, I believe we ought to explore the possibility of curtailing, or even eliminating, the unnecessary programs at the federal level. Second, I believe we ought to explore the possibility of reallocating functions, so that those better performed at

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[34] *Id.* at 28.

[35] *Id.* at 41.

the state and local level could be returned there. Let me say a word about each of these points in turn.

As the Final Report of the Joint Federal-State Action Committee emphasized, "once programs are shifted to the Federal level, proponents of Federal aid and administration exert strong pressure to keep them there."[36] This is simply a fact of political life with which we must live. Programs, once established, take on a life of their own. *Very few are put to death; even fewer undertake to commit suicide.* While we may hope that this version of Parkinson's Law will not hold true in the future, experience suggests that it will. Our efforts in this connection should include, as the Joint Federal-State Action Committee suggested, the prevention of the creation of unnecessary programs in the future. In its words: "New programs should be established only upon thoughtful consideration of the issues and when there is a clearly demonstrated national interest and need for the programs."[37] This is not an easy formula to apply. There has come to be a growing tendency in recent decades to rush to Washington in the face of every calamity, whether it be short-lived or likely to remain with us for some time. I might add that this development has sometimes been assisted by the very state officials who, at a later date, castigate the federal government for its assumption of new responsibilities and functions. We must, if we possibly can, resist this tendency. We must resist the tendency, first, to think that every problem can be met, and ought to be met, by governmental action; we must avoid the tendency to think that we can legislate ourselves into Utopia. Secondly, we must resist the tendency to think immediately in terms of national rather than local action. If the situation is such that action is clearly and unquestionably demanded, then we ought to consider the possibility that the required action can be taken by the local community, or by the state, involved. If we fail to approach the problem in this way, we contribute to the very evil which we continually decry.

I believe the Joint Federal-State Action Committee is correct in pointing out that the concentration of power in Washington is augmented by the tendency to think in terms of "crash programs." In its words: "In some measure, the present degree of Federal participation in State and local affairs reflects previous failures to anticipate needs. This failure in a sense creates a vacuum into which the Federal Government almost irresistibly moves or is forced."[38] In short, the march of power to Washington is often linked with the failure of the states themselves to look ahead and to assume their responsibilities. This point

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[36] JOINT FEDERAL-STATE ACTION COMMITTEE, FINAL REPORT TO THE PRESIDENT OF THE UNITED STATES 6 (1960).

[37] *Ibid.*

[38] *Id.* at 7.

was emphasized by President Eisenhower in the course of his address to the Governors' Conference in 1957: "Opposed though I am to needless Federal expansion, since 1953 I have found it necessary to urge Federal action in some areas traditionally reserved to the States. In each instance State inaction, or inadequate action, coupled with undeniable national need, has forced emergency Federal intervention."[39]

As Elihu Root pointed out more than fifty years ago:

> It is useless for the advocates of states' rights to inveigh against the supremacy of the constitutional laws of the United States or against the extension of national authority in the fields of necessary control where the states themselves fail in the performance of their duty. The instinct for self-government among the people of the United States is too strong to permit them long to respect anyone's right to exercise a power which he fails to exercise. The governmental control which they deem just and necessary they will have. It may be that such control would better be exercised in particular instances by the governments of the states, but the people will have the control they need, either from the states or from the national government; and if the states fail to furnish it in due measure sooner or later constructions of the constitution will be found to vest the power where it will be exercised—in the national government.[40]

The same point is emphasized again and again in the Kestnbaum Commission report. Consider, for example, this statement.

> By using their power to strengthen their own governments and those of their subdivisions, the States can relieve much of the pressure for, and generate a strong counterpressure against, improper expansion of National action. Thereby they can increase their chances of enjoying an enlarged participation in the total task of governing the Nation.[41]

The task, and it is a particularly challenging one as you well realize, is to assure ourselves that the states become, and remain, effective and efficient units of government. This point was re-emphasized by the Kestnbaum Commission: "The Commission believes that most states would benefit from a fundamental review and revision of their constitutions to make sure that they provide for a vigorous and responsible government, not forbid it."[42]

Beyond this, of course, there will also have to be some attention given to the re-allocation of tax resources. The fiscal advantages enjoyed by the Federal Government have been accurately described as follows:

> The National Government has greater financial powers than State or local governments. It has broader taxing resources and

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[39] *The Principles of Free Government*, 30 STATE GOVERNMENT 168, 169 (1957).
[40] Quoted in REPORT, *op. cit. supra* note 6, at 56.
[41] *Ibid.*
[42] *Ibid.*

> superior borrowing powers. Since the enactment of the Sixteenth Amendment, it is constitutionally limited only in regard to property taxes and export duties. It has access to the combined resources of the entire Nation and is not restricted by the interstate and intercommunity competition which limits the taxing freedom of smaller governments. It has control over the monetary and banking systems. Moreover, it has greater budgetary flexibility, for unlike many states, it is not restricted to annually balanced budgets.[43]

The absence of flexibility at the state and local level, to which I have already referred, is compounded by certain other disadvantages. As the Kestnbaum Commission pointed out in its report:

> Among the problems faced by the States are the possibility of interstate tax competition, jurisdictional conflicts associated with the allocation of tax bases, and the need for avoiding interstate trade barriers. The growing complexity of our industrial economy places the larger units in a relatively stronger position in the imposition and collection of taxes.[44]

To some extent, as the Commission pointed out in its chapter devoted to the financial aspects of the federal system, the state may correct this by striving for a greater degree of flexibility in its fiscal structure and by exploring the sources of revenue now open to it more fully.

However, it seems clear to me that we will have to go a step beyond this and explore the extent to which the federal government may, through its own taxing policies, have deprived the states of an adequate tax base. With this information in hand, we can then consider the possibility of reallocating certain sources to the states.

I am gratified to see that the Kestnbaum Commission gave some attention to this problem in its studies, and that both the Joint Federal-State Action Committee and the Advisory Commission on Intergovernmental Relations have in turn addressed themselves to the problem. The study released by the latter late last year, entitled "Overlapping Taxes in the United States—1961" offers much valuable information. The Third Annual Report of the Advisory Commission suggests, moreover, that several of its current projects are directed to this general problem.

I might point out in this same connection that a Joint Committee of the American Bar Association, the National Tax Association and the National Association of Tax Administrators have studied the problem and made specific proposals urging that the taxes on transfers of property during life and at death and those on gasoline, motor vehicle registration, general sales, amusements and admissions be reserved for the states. It suggested that the states, in turn, relinquish tobacco taxes for exclusive federal use, but that both federal and state jurisdictions continue to exploit liquor taxation.

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[43] *Id.* at 92.

[44] *Id.* at 94.

These are wise suggestions. I believe we need to give some thought to them, as well as continued attention to the problem as a whole. In the long run I believe it would be desirable to secure a general separation of revenue sources among the various levels of government. This may be a utopian goal, however, for, as the Kestnbaum Commission pointed out, "The full elimination of tax overlapping is not feasible under present-day conditions, when many levels of government, operating in the same geographical area and within a complex economic structure, require so large a total share of the national income."[45] We can, however, take additional measures to reduce the present degree of tax overlapping, to achieve a greater degree of tax coordination among the various levels of government, and to secure for the states and local communities the necessary tax resources to do those tasks which the states and localities can best perform. Failure to come to grips with these problems may "undermine the very strength of our governmental system which it is our purpose to preserve and improve."[46] We must strenuously oppose the great tendency of the age to centralize power and resources in Washington. That was not the purpose of the founding fathers and it is not the best way to solve our manifold problems today.

Some activities, like the defense of the nation, only a central government can perform. Such activities we have instituted that government to perform, and it has ample tax resources for the purpose. On the other hand, the conduct of public education, provision for the public health, morals and safety, fixing of qualifications for voters, the electoral machinery, law enforcement, housing, provision for the local water system and the local sewage system, and the care of local highways are activities that the localities are well able to handle. We should make sure that the states and localities have the tax resources to perform their allotted local tasks. Finally, you and I can do many things for ourselves better than any government, small or great, can do for us. Subject to the necessary demands of government, we should be left as free as may be to spend what we earn.

We are fighting a cold war for the freedom of the individual and for private enterprise. That is our system. We must not submit to its being taken from us nor to its being frittered away.

Surely it is possible to reallocate tax sources not only to eliminate duplicate use of the same tax but to put additional revenue in the hands of local authorities for local uses. This is the best way I know of to avoid further undesirable centralization of governmental activities in Washington. It is also the best way to keep the tax burden under control.

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[45] *Id.* at 104.

[46] *Id.* at 117.

IV. Is the Abolition of the States Our Goal?

I have throughout my discussion assumed the value of the federal system as a whole. But it may be worth giving some additional thought to that assumption. One might ask, as some have, whether it is worth saving the federal system at all. Professor Harold Laski, writing in the late thirties, in an article entitled "The Obsolescence of Federalism," suggested not only that federalism was on the decline, but that this was a desirable development. In this connection he made the following comments:

> The epoch of federalism is over . . . . It is insufficiently positive in character; it does not provide for sufficient rapidity of action; it inhibits the emergence of the necessary standards of uniformity; it relies upon compacts and compromises which take insufficient account of the urgent category of time; it leaves the backward areas a restraint, at once parasitic and poisonous, on those which seek to move forward; . . . its psychological results, especially in an age of crisis, are depressing to a democracy that needs the drama of positive achievement to retain its faith.[47]

One can, of course, grant the partial truth of many of his criticisms without in turn granting the desirability of his conclusions. One can grant the fact that the states and local communities have sometimes failed to undertake to fulfill their responsibilities to their own citizens as rapidly and as efficiently as we might have wished them to. The Kestnbaum Commission granted as much in its 1955 report, and yet reached quite different conclusions from those of Mr. Laski. In its words:

> As an instrument of positive government, it [the federal system] possesses—at least for a nation as large and diverse as ours—a clear advantage over a strongly centralized government. In helping to bolster the principle of consent; in facilitating wide participation in government; in furnishing training grounds for leaders; in maintaining the habit of local initiative, in providing laboratories for research and experimentation in the art of government; in fostering competition among lower levels of government; in serving as outlets for local grievances and political aspirations—in all these and many other ways, the existence of many relatively independent and responsible governments strengthens rather than weakens our capacity for government. On the whole, therefore, the enduring values of our federal system fully warrant every effort to preserve and strengthen its essence.[48]

Dr. George C. S. Benson expressed similar sentiments in a recent address:

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[47]Quoted in White, *op. cit. supra* note 10, at 1.

[48]Report, *op. cit. supra* note 6, at 3.

> Why should we struggle to keep this system? I would like to give three major reasons: avoiding concentration of power, development of the citizenry, and adapting government to the needs of the areas.
>
> One should not lightly throw away the safeguard of liberty which decentralization of government furnishes.
>
> One can hardly say that we have so strong an ingrown national psychology toward constitutional government that we can ignore political safeguards of liberty such as that furnished by decentralization of government.
>
> There is a strong second line advantage. Where, in a book published twenty years ago, I stressed the advantage of decentralized government as a means of developing political leadership, I would today stress the broader importance of decentralization of government as a means of keeping people interested in their government and developing their own sense of political responsibility. Perhaps experiences with people who lack a sense of political responsibility have led to this conclusion.
>
> If we want our people to be self-respecting, to have some sense of doing things themselves, should we not try to keep some aspects of policymaking, of importance in their local and state governments?
>
> The answer to this question revolves around the issue of whether citizenry are better developed by assuming minor policy-making roles in a federally directed grants-in-aid enterprise or by assuming complete responsibility for certain functions themselves. My own feeling is that complete responsibility is more likely to develop good citizens.[49]

The individual state and local governments can more efficiently, economically and satisfactorily take care of their own peculiar needs. As truly as the population, climate, economy, culture, natural resources and terrain of these various areas within our vast United States differ from one to another, so must the government of each area be patterned to fit individual requirements. No central government, removed from these divergent problems and their accompanying perplexities, can give considered attention to even a substantial portion of them on a reasonable equitable basis.

John A. Beckett, Assistant Director of the Bureau of the Budget of the United States, aptly put it this way:

> There is not just one government in the United States; there are many. We sometimes forget this when we speak of "government." In a democracy, one of the characteristics of government is the maintenance of public services which are responsive to local needs and choices. The further we remove the issues

[49]Benson, *op. cit. supra* note 32.

> of government from the local scene, the greater is the tendency of government to lose its sensitivity to local needs. That is why we have state, county, township, and city governments in the United States.[50]

On the other hand, a central government can better and more efficiently control those areas which are peculiar to it if it concentrates only on those areas and leaves the remainder of the public responsibility to the state and local governments. The point was developed by the Kestnbaum Commission in the course of its argument for the desirability of strengthening the position of the states in the federal union. In its words:

> Far from weakening the National Government, the strengthening of State and local government would increase its effectiveness. The responsibilities that unavoidably fall on the National Government are formidable. The fullest possible utilization of the resources of the State and local governments is desirable both to supplement National action where National action is necessary, and to relieve the National Government of having to divert its resources and energies to activities that could be handled as well or better by the States and their subdivisions.[51]

Surely the President and his staff could better handle national defense and foreign policy if they were not so concerned with public housing, public schools, and other areas which should properly be within the realm of state and local authority.

I believe, of course, that the problem of a proper allocation of responsibilities can be a troubling one. Here again men of good will can disagree. And here again I believe the Kestnbaum Commission has offered us a reasonably good starting point. As a fundamental criterion in these matters, it offered the following statement:

> Leave to private initiative all the functions that citizens can perform privately; use the level of government closest to the community for all public functions it can handle; utilize cooperative intergovernmental arrangements where appropriate to attain economical performance and popular approval; reserve National action for residual participation where State and local governments are not fully adequate, and for the continuing responsibilities that only the National Government can undertake.[52]

We have heard much about the alleged sickness among the people of the United States today—an inertia, almost a general apathy. During the past several months I have had an opportunity to talk with people in all corners of this nation of ours, and in all walks of life, and I am here to testify to the fact that such a sickness does exist.

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[50]Beckett, *op. cit. supra* note 24.

[51]Report, *op. cit. supra*, note 10, at 4-5.

[52]*Id.* at 6.

People just don't seem to care any more. They want security at any cost, they feel that they have it, and they see a future which offers even more of it. It seems particularly appropriate to here note that nearly a century and a half ago, a noted Englishman wrote: "The Americans will perhaps lose their freedom when they begin to reap all the fruits of it, for the *energy* necessary to acquire and hold freedom, and the *ease* which follows the enjoyment of it, are almost incompatible."

The great federal handout programs are destroying the sense of initiative of the bulk of our populace. For there to be a spirit of freedom and healthy independence, there must be a spirit of giving on the part of the state and the people of the states and not the chagrin of being given to. Maurice Stans, former Director of the Bureau of Budget, has said: "First we must appraise the Soviet threat! . . . The probability is that they still choose the economic battlefield, renewing Mr. Khrushchev's challenge to the free enterprise system. In effect, he has pledged all the energies of the Soviet system toward making us a second-class economic power . . . ."[53]

Where will we muster the forces to stop this threat? There is not much economic vitality in a handout line. The sickness in America today is clearly connected with and, I would argue, an ultimate result of a public acquiescence to the dominant force of centralization of governmental control. We are reaping what we as a people have sown. What we see before us is what any number of commentators have warned us of in the past. I suspect that many of you have had occasion to refer to the excellent study of the federal structure prepared by Leonard White and published in 1953, entitled *The States and The Nation*. Let me recall some words of Professor White:

> I do predict, . . . that if present trends continue for another quarter century, the states may be left hollow shells, operating primarily as the field districts of federal departments and dependent upon the federal treasury for their support. This result would be bad for the federal government and would hold grave consequences for the kind of self-governing, local democracy that has been an essential part of our way of life.[54]

The trend has, in fact, continued. We have, in fact, begun to suffer the difficulties which it brings in its train. If it continues unchecked, it can be expected to lead to the eventual destruction of the integrity of the states and the independence of the individual. Unless it is reversed, and it can be reversed only if we act, and act quickly, it is highly questionable whether our country can survive the battle for men's minds being waged so subtly yet so devastatingly across our globe today.

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[53]Address by Maurice H. Stans, Director, U. S. Bureau of Budget, to Annual Meeting of New Jersey State Chamber of Commerce (June 20, 1960).

[54]WHITE, *op. cit. supra* note 10, at 3.

V. It Is Up to You and Me

I have not intended to picture a hopeless situation! The encouraging realization exists that the tools with which the sovereignty of the states, within their proper hands, and the individual integrity of the people may be regained and are in the hands of the people and states now. Within a decade these tools may be lost beyond recall.

The historical outline of how the English government became decentralized should not be ignored in this connection. The federal government must still come back to the people for its support, and that support can be withheld in those areas in which the people do not want the federal government to move. The people of any given state cannot help but have at least a geographical attachment to that state, and if their attachment justifiably goes further, the state is theoretically in an excellent position to retain for itself and/or to redelegate to local governments those functions which the people are confident can be handled better at home.

Moving from the theoretical to the practical, if the people of any given state were made to realize the following two facts, there would be greater sentiment toward retention of public moneys within such state. These facts are: (1) that the bulk of the people of the states which are now fighting to retain what little sovereignty is left are putting only a percentage of their money into Uncle Sam's grab bag in proportion to what they are getting out, and (2) in the reverse, the people of the states which appear to be giving in most rapidly to the centralization of our government are thereby paying the price tag of the federal handouts to persons who profess not to want them.

A recent study of the Tax Foundation, an independent organization engaged in Federal, State and local governmental research, illustrates this fact.[55] My own state of Mississippi, according to the statistics collected by the Foundation, pays only 41 cents for every dollar of federal aid it receives. Alaska comes out even better: it pays only 17 cents for every dollar of aid. New Jersey, on the other hand, pays 2.07 for every dollar in federal aid it receives; Delaware pays 2.01, and New York, 1.63. The states served through the southern office of the Council of State Governments rank as follows:

	Payment to State (In Millions)	*Estimated Tax Burden*	*Amount Paid per Dollar Received*
Alabama	170.4	86.8	.51
Arkansas	99.0	45.7	.46
Florida	175.3	184.8	1.05
Georgia	183.0	116.3	.64
Kentucky	134.8	82.8	.61

[55]Cited by Senator Byrd in 108 Cong. Rec. 8951 (daily ed. June 5, 1962); all data cited here is taken from this source.

	Payment to State (In Millions)	*Estimated Tax Burden*	*Amount Paid per Dollar Received*
Louisiana	199.1	94.1	.47
Maryland	92.5	122.8	1.33
Mississippi	120.1	49.4	.41
Missouri	197.5	167.6	.85
North Carolina	146.0	127.4	.87
Oklahoma	168.1	82.1	.49
South Carolina	89.0	60.4	.68
Tennessee	169.3	100.8	.60
Texas	359.8	352.1	.98
Virginia	132.8	131.7	1.00
West Virginia	91.2	51.3	.56

Of course there are states in many other sections of the country which benefit materially from federal funds, such as North Dakota which pays 45 cents for every dollar of aid, Oklahoma which pays 49 cents for every dollar of federal aid, South Dakota, which pays 42 cents for every dollar, Vermont which pays 48 cents, West Virginia which pays 56 cents and Wyoming which pays 47 cents for each dollar of federal aid. In fact, 35 states receive more federal aid than they pay in federal taxes.

Let us glance at the other side of the coin to see the states which are being penalized for the benefit of those states which are the recipients of federal largess:

	Payment to State (In Millions)	*Estimated Tax Burden*	*Amount Paid per Dollar Received*
California	624.2	729.8	1.17
Connecticut	85.5	129.3	1.51
Delaware	15.0	30.2	2.01
Illinois	352.7	428.0	1.21
Indiana	141.3	175.0	1.24
Massachusetts	171.7	218.4	1.24
New Jersey	132.4	273.8	2.07
New York	430.7	750.4	1.63
Ohio	305.1	387.1	1.27
Pennsylvania	310.8	440.5	1.42

Rather strange, isn't it? I find it hard to believe that most of the citizens of Delaware, for example, relish this sort of arrangement. Rather, I suspect that they aren't really aware of it. If those who are being robbed by the federal government would simply join hands with those whom the money is being forced upon, there would be an overwhelming amount of sentiment for reduction of governmental expenditures.

Incidentally, if you should wish to see how all the other states rank, a summary of this information reported by the Tax Foundation in this connection was placed in the *Congressional Record* of June 5, 1962, by Senator Harry Byrd.

Now, what are we to do, or what can we do, in the face of this situation. It would be simple enough for me to conclude this presentation by pointing out that the responsibility is in your hands to go out and do something about the complete socialization through centralization of our government. I could and would encourage you as individuals and as a group to write your Congressmen and to tell them to vote against measures which will result in increased federal usurpation of the sovereignty of the states, even when such measures will result in money being given to your state and to you. However, no one individual nor any one group now constituted would speak with sufficient force and authority to deter the present onrush in the wrong direction.

There is at least one possible solution which comes to my mind. I believe that it is true that the governments of the respective states themselves desire to preserve their sovereignty to the greatest extent reasonable. Given the full picture, these various state governments, speaking both individually and as a group, could present formidable opposition to the forces of centralized government.

I would recommend that each and every state government provide for the establishment of a *permanent commission* which would be responsible for the study and analysis of the problems of state and local control versus federal control, and the effect of centralization and decentralization upon the various areas of public responsibility within such state. The commissions thus established from the several states could then meet together on a regular basis for the discussion of mutual problems in this general area, for the purpose of taking issue with legislation which would further rob the states of their sovereignty, and for the sponsorship of legislative action designed to have recommitted to the states those fields of responsibility and authority which properly should be theirs. Here would be a united voice from home to speak with authority against the pressure groups which crowd the capital.

It is not my intention in advancing this suggestion to ignore or denigrate the efforts of existing groups which devote themselves, primarily or in part, to the investigation of this same problem. Your own organization, as you well know, devotes time and effort to research in this area. The study which it prepared for the Hoover Commission in 1949, for example, still merits attention on the part of those who are concerned with the problem. Similarly, the groups affiliated with the Council have, from time to time, considered aspects of this problem. I have in mind, for example, the efforts of the Committee on Federal-State Relations of the Governor's Conference. A number of private groups have also made significant contributions to an understanding of the problem. I believe this widespread concern is significant.

I am encouraged, moreover, by the willingness of Congress to further research in this area through the creation in 1959 of the permanent Advisory Commission on Intergovernmental Relations. I need not go

into any detail in regard to the historical background of this Commission, for most of you are familiar with it and with its immediate predecessor, the Joint Federal-State Action Committee. The research studies and reports issued by both of these groups suggest that they have performed a valuable service in the past, and we may anticipate, on the basis of what we have seen of the Advisory Commission's work in the last two years, that it will continue this tradition in the future. I have no doubt that a good deal of the Commission's accomplishment can be traced to the efforts of its Chairman, Mr. Frank Bane, who served for some years as the Executive Director of the Council of State Governments.

I believe it is all to the good that we have this variety of groups, both public and private, engaged in the study of this problem, and in suggesting the creation of commissions at the state level, it is not my intention to suggest that the existing groups have failed in their responsibilities. What I am suggesting is that the problem is such that it deserves and requires, the fullest possible consideration on every level. It deserves, and requires maximum and sustained attention. The facts must be brought home to every citizen and impressed upon the minds of every state and local official. There are those who assert, of course, that the people are getting just what they want as a result of this continued centralization of power, that security rather than liberty is their goal, and that they will find this security in the arms of an all powerful and all encompassing central government. I do not believe that is the case. Prior to his inauguration in 1913, Woodrow Wilson made the following observation:

> If any part of our people want to be wards, if they want to have guardians over them, if they want to be taken care of, if they want to be children patronized by the Government, I am sorry, because it will sap the manhood of America. But I don't believe they do. I believe they want to stand on the firm foundations of law and right and take care of themselves.[56]

I believe that his observation is as true today as it was when he made it. I believe the central problem lies in the absence of a public understanding of what is, in fact, happening to them. Additional light must be shed on this problem. I believe that permanent state commissions could assist in this process of public enlightenment. I believe they could supplement, without any risk of supplanting, the existing agencies. By coordinating their activities with the existing agencies, by serving as sources of information and advice for such national groups as the Advisory Commission on Intergovernmental Relations, I believe we might advance much further in the campaign against public ignorance and apathy at the state and local level than we have been able to in the past.

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[56]Pettengill, *A Boundless Field of Power*, 12 Freeman no. 4, p. 6 (1962).

Certainly, it behooves us to make this attempt. George Washington once said: "Government is not reason, it is not eloquence—it is force! Like fire, it is a dangerous servant and a fearful master." By way of seizing our purse-strings, our federal government has indeed become a fearful master. If we fail to move quickly in the right direction, we will never again be free individuals, but will be forever enslaved by our own lack of initiative and foresight.

I close with the admonition of Maurice Stans when he was Director of the Bureau of the Federal Budget, to the citizens of the United States in whose hands the ultimate decision rests:

> We, all of us, have the power to halt this ruinous race toward calamity.
>
> If you are a businessman who believes government spending must be cut to keep our enterprise system free, then you can make sure that you do not support industry groups driving for government subsidies, direct or indirect.
>
> If you are a union member who wants to keep your living standards high, you can fight against labor leaders who urge huge government programs that rob your wages by forcing higher taxes or deficit spending and inflation.
>
> If you are a farmer, veteran or schoolteacher, or belong to any group that is asking for government money or special treatment, stop and ask yourself whether the nation's interests shouldn't come first.
>
> If you are just a citizen who doesn't want economic calamity for yourself and your children, then insist on prudent government. To block the self-serving special interests that are ceaselessly driving us toward bankruptcy, I urge you to mobilize yourselves. Make yourself heard. Now. It is your own future that is at stake.[57]

[57]Stans, *Must We Delude Ourselves into Disaster?*, 75 Readers Digest no. 447, p. 88 (July 1959).

THEY WILL BURY THEMSELVES— IF WE HELP THEM*

Most Americans solemnly agree that we must know more about communism if we are to be able to combat it effectively. We have been told time and again that ignorance of the Communist philosophy, strategy, and objectives imperils our own system, for we must know our enemy if we hope to defeat him. Although we agree with this reasoning, few of us act accordingly. How many Americans have read even one book on communism within the last year? How many of us have studied the philosophy of communism, and have compared their theory with practice? All too few of us could answer these questions satisfactorily. Unfortunately, apathy and complacency have smothered our resolutions to become more aware. Recognizing this attitude, Allen W. Dulles has said:

> There is a dangerously complacent attitude among many people in the United States today. Too many Americans, lulled by wishful thinking, grasp at every Soviet whim—their calls for co-existence, their grandiose schemes for universal disarmament, and emotional pleas to ban the bomb. Too many jump to the conclusion that the communist leaders really want to settle down and live in peace with us. All our past relations with the communists belie any such interpretation. During the ten years that I have been with the Central Intelligence Agency, a mountain of hard evidence has passed over my desk. The Soviet plans, statements and actions show that they have no real faith in co-existence. The communists have a blueprint for conquest. They are aiming at nothing less than domination of the world. The United States is their major target.[1]

To know more about communism, we should begin by familiarizing ourselves with the basic tenets of its ideology. The four tenets which are the foundation of Communist ideology are: (1) the doctrine of historical materialism; (2) the doctrine of dialectical materialism; (3) the theory of surplus value; and (4) the inevitability of the class struggle. Each of these tenets will be examined briefly.

The theory of historical materialism, as a concept of history, holds that the nature of the political institutions and the intellectual life of society is determined by economic forces which are their foundation. In this view, the history of civilization is a series of social systems—from slavery through feudalism to capitalism—each based on some type of exploitation of the working class, with all persons divided into two classes—the exploiting and the exploited.

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*An address by John C. Satterfield before The Missouri Bar, Jefferson City, Missouri, March 2, 1962.

[1]Address delivered before the convention of the Veterans of Foreign Wars; Detroit, Michigan, August 22, 1960.

Working from this view of history, the Communists describe social change by means of the theory of dialectical materialism. The Communists have "borrowed" the dialectic system as propounded by the German philosopher Hegel and adapted it to their purposes. According to the theory of dialectical materialism every force of life brings into existence an opposing force. The original force (thesis) will inevitably clash with the opposing force (antithesis), and as a result a third force (synthesis) combining elements of both will emerge. Marx applied this theory in the following manner: capitalism contains the elements of its own destruction—revolt of the working class—and from this conflict between the capitalists and the working class will emerge a new force, the Communist society.

Communists bolster their arguments of dialectical materialism by use of the theory of surplus value and the resulting inevitability of the class struggle.

The theory of surplus value is that labor is the sole creator of value, and that wages received by labor represent less than the total value that labor creates. Value in excess of wages paid to labor is "surplus value," and is the measure of the capitalists' exploitation of the working class. According to Marx, the theory of surplus value accounts for the major inequalities and evils of the capitalistic society.

The final basic tenet of the Communist ideology is the inevitability of the class struggle. The *Communist Manifesto* states: "The history of all human society, that is all written history, past and present, has been the history of class struggles."[2]

In the Communist view, the class struggle is not a thing of the moment, but a continuing warfare—sometimes open and acknowledged, sometimes hidden—between the exploiting and exploited classes. The class struggle will either end in a revolutionary change in the whole structure of society or in the common ruin of the contending classes. Marx believed that the class struggle is inevitable in capitalistic societies, and that eventually all class struggles will culminate in the triumph of the proletariat over capitalism. What methods have been proposed for the carrying out of the class struggle? The *Communist Manifesto* answers in this way: "The communists disdain to conceal their views and their aims. They openly declare that their ends can be obtained only by the forcible overthrow of all existing social conditions."[3]

These then are the basic tenets of the Communist ideology. From them the Communists reason "scientifically" that the collapse of capitalism is imminent, and the triumph of world communism inevitable. To the Marxist-Leninist theorist the capitalist state exists for only two purposes: the first is to perpetuate the economic system upon

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[2]MARX, COMMUNIST MANIFESTO 13 (Gateway ed. 1954).

[3]*Id.* at 81-82; see also INTERNATIONAL PUBLISHERS, MARXISM 45-46, 59 (1935).

which it is founded, and the second is the continued exploitation of the working class. Any capitalistic state, whether monarchy, republic or corporate state, is viewed as a dictatorship of the capitalists over the working class. Such systems cannot exist side by side with the Communist system, inasmuch as world communism must eventually prevail everywhere, in all nations and over all peoples. "Exploitation" of the proletariat can be eliminated only by the elimination of the system of private ownership. All property and all means of production must be controlled by the proletariat. The obvious fact that the capitalists are not going to embrace these beliefs, nor give up their property rights is ample explanation for the Communist belief in the inevitability of class warfare.

It was Marx's belief that the proletariat would spontaneously follow the leadership of the Communist party and rise as a mass in revolution to "throw off the shackles" of capitalism. Lenin, however, had no such faith in the proletariat. Lenin believed that the proletariat could not be relied upon to develop a revolutionary class-consciousness on its own. His contribution to Communism was the dogma of "partyism." This dogma holds that any revolution must be led by a small, strictly disciplined, semi-secret party, the "revolutionary vanguard." This party of professional revolutionists would have as its sole objective the eventual triumph of communism everywhere. This is the Communist party as begun by Lenin, brought to fulfillment by Stalin, and presently perpetuated by Khrushchev. It retains its elite professional character—this is illustrated by the fact that only eight million Soviet citizens are Communist party members; this is less than four per cent of the total population of the U.S.S.R.

Lenin also "interpreted" Marx's theory of the withering away of the state after the proletarian revolution. Marx believed that the withering away process would follow shortly after a period of the "caretaker state." Lenin, and those who have followed him, held that the state cannot wither until the period of transition from capitalism to communism is complete throughout the entire world. Thus, the "caretaker state" in the U.S.S.R. has grown stronger and more powerful; it shows no signs of withering away. The process of withering away is not to begin until all "dissident elements" have been removed from society.

To the doctrinaire Communist any methods which will hasten the collapse of capitalism and the triumph of Communism are right and proper. Any and all means to secure the objectives of the Communist party are encouraged. Lenin has said, ". . . [R]evolutionaries who are unable to combine illegal forms of struggle with every form of legal struggle are very poor revolutionaries . . . ."[4] And on another occasion,

[4]10 LENIN, *Left-Wing Communism, An Infantile Disorder*, in SELECTED WORKS 139-40 (1943).

he stated: "Until the final issue [between capitalism and communism] is decided, the state of awful war will continue."[5] And later: "As long as capitalism and socialism [communism] exist, we cannot live in peace; in the end one or the other will triumph—a funeral dirge will be sung either in Soviet Republic or over world capitalism."[6]

Many persons throughout the world delude themselves into thinking that the views of Lenin as expressed are no longer adhered to by today's Communist party leaders. Such wishful thinkers need only be referred to a speech made by Premier Khrushchev on January 6, 1961, in which he reaffirmed the party's adherence to Lenin's beliefs as follows:

> Today our party is united as never before; it is closely rallied round the Central Committee, it is confidently leading the country down the path pointed out by the great Lenin . . . . [I]f anyone thinks we shall forget about Marx, Engels and Lenin, he is mistaken. This will happen when shrimps learn to whistle.[7]

We must keep these sentiments in mind, especially when the Communists glibly talk of "peaceful co-existence," an end to the cold war, and lasting peace between our two systems. As our President, John F. Kennedy, has reminded us, the Communist approach in such dealings is: "What is ours is ours, and what is yours is negotiable."[8] We must not lose sight of the ultimate objectives of the Communists in our heartfelt desire for peace and disarmament.

We must remember when negotiating with the Communists, we are negotiating with persons who do not share our basic beliefs. Communist morality is a far different thing from the Judeo-Christian morality of the western democracies. This is how Lenin defined Communist morality:

> We repudiate all morality derived from non-human, non-class concepts. We say that it is a deception, a fraud in the interests of landlords and capitalists. We say that our morality is entirely subordinated to the interests of the class struggle of the proletariat. Morality is what serves to destroy the old exploiting society and to unite our toilers around the proletariat which is creating a new communist society. . . . We do not believe in eternal morality.[9]

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[5] 9 LENIN, *Tactics of the Russian Communist Party (Bolshevik)*, *op. cit. supra* note 4, at 242.

[6] 8 LENIN, *Speech to Moscow Party Nuclei Secretaries*, Nov. 26, 1920, *op cit. supra* note 4, at 297.

[7] Speech by Nikita Khrushchev, Jan. 6, 1961, in ABA, PEACEFUL CO-EXISTENCE—A BLUEPRINT FOR DISRUPTION (1961).

[8] Speech by Pres. John F. Kennedy on the Berlin Crisis, July 25, 1961, in 27 VITAL SPEECHES 642.

[9] LENIN, *Tasks of the Youth Leagues* in THOMAS, COMMUNISM VERSUS INTERNATIONAL LAW 50 (1953).

An address such as this can only scratch the surface of such a broad subject. However, it will have served its purpose of it inspires anyone to examine the matter more thoroughly and thoughtfully. Harry and Bonaro Overstreet have said:

> There comes a point when the world's peril turns into every individual's responsibility. So far as the problem of communism is concerned, this point, we feel certain, has long been reached and passed. The time has come when each of us is obliged to study the character of this new force which claims the human future as its own, and to convert such knowledge into an awareness of what is at stake and what needs to be done.[10]

Ignorance of Communism cannot help but hurt us. On the one hand, ignorance of this menace may lead the unwary to willingly accept or be bullied into accepting the inevitability of world communism. The principal weapon to fend off such a threat is knowledge of the truth. Those of us who seek to repel the Communist threat must understand its nature, be aware of its strategy, and not lose sight of its ultimate objective—our destruction. On the other hand, ignorance of communism hobbles those who believe they are fighting it. As J. Edgar Hoover, the Director of the Federal Bureau of Investigation, has said:

> Too often have I seen cases where loyal and patriotic but misguided Americans have thought they were "fighting communism" by slapping the label "red" or "communist" on anybody who happened to be different from them or have ideas with which they did not agree. Smears, character assassination and the scattering of irresponsible charges have no place in the nation. They create division, suspicion and distrust among loyal Americans—just what the communists want—and hinder rather than aid the fight against communism.[11]

We must avoid these twin perils of ignorance if we are to disprove for once and for all Khrushchev's infamous and hollow boast that the Communists "will bury us." Our first task is to inform ourselves. Then we will be able to effectively combat communism and offer the world our own "creative commitment with regard to the future of mankind."

So far this address has been an exercise in generalities; any subject may be discussed in such a manner, but the discussion can usually be made more fruitful by reference to specifics. Let us choose one specific topic from the vast subject of communism, and explore it in more detail. Before getting down to specifics we should prepare ourselves a little more thoroughly. We can do so by keeping in mind the Communist device of twisting words to fit whatever purpose they wish. The follow-

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[10]OVERSTREET, WHAT WE MUST KNOW ABOUT COMMUNISM 10 (1958).

[11]HOOVER, MASTERS OF DECEIT (1958).

ing is a short list of key words and their current meaning as used by the Communists:

Democracy:	Communism
Peace:	Communist world domination
Socialist:	Communist
Bourgeois:	Non-communist
Communism:	The terminal condition when non-communist modes of thought will have been completely suppressed and forgotten
Capitalism:	Any non-communist system, including democracy
Imperialism:	A non-communist system actively opposing the spread of communism, especially the U.S.A.
Colonialism:	Any foreign aid extended by a non-communist country
Liberation:	The seizure of a non-communist country by communists
Independence:	Submission to communist control

By keeping these definitions in mind, we will be better able to understand and cope with Communist propaganda. This will be especially helpful in considering in some detail a specific topic—the latest Communist line, that of peaceful co-existence.

Many people in the western democracies and the neutral nations have been beguiled by the latest line of the Communist party. This line is, of course, the line of "peaceful co-existence." Nearly a half century ago, 1916, Lenin laid out the official Communist party view of such a tactic. He said: "Every 'peace program' is a deception of the people and a piece of hypocrisy unless its principal object is to explain to the masses the need for a revolution, and to support, aid, and develop the revolutionary struggle of the masses that is starting everywhere."[12]

The present Communist leaders undoubtedly have this directive in mind while propagating their "new" line of peaceful co-existence. However, many persons have deluded themselves, and believe that the current line is genuinely new, and that the Communists sincerely desire to peacefully co-exist with us as we understand that phrase. Such persons should be referred to the speech made by Nikita Khrushchev on January 6, 1961, in which he said, ". . . if anyone thinks we shall forget about Marx, Engels and Lenin, he is mistaken. This will happen when shrimps learn to whistle."[13]

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[12]5 LENIN, *Central Committee Proposals Submitted to Socialist Conference, April 1916, op. cit. supra* note 4, at 237.

[13]Speech by Nikita Khrushchev before the 81st Marxist-Leninist Parties, Dec., 1960 in ABA, *op. cit. supra* note 7, at 1.

It should, therefore, be plain that Khrushchev's peaceful co-existence in 1961 is the same as Lenin's peaceful co-existence in 1916. Only the window dressing has changed; the underlying position is identical. To many western reporters and delegations from western and neutral nations, Mr. Khrushchev blandly suggests that the capitalists and the Communists should peacefully co-exist; that they should wage their battle for the minds of men by competing in trade, science and cultural exchanges.

When Mr. Khrushchev talks of "peaceful co-existence" with the rest of the world, those in the west should examine what has happened to those who, stopping short of complete and abject surrender, attempted to co-exist with the party both in Russia and in other nations behind the Iron Curtain. It is estimated that between five and seven million Russian peasants were eliminated for refusing to cooperate with Stalin's plan to collectivize agriculture. At one time, shortly before Stalin's death, the number of slave laborers in force labor camps approached twenty million; the number is now estimated at three million. The purges of the late 1930's resulted in the death of nearly 50,000 Russian military and government leaders. The most recent example of Russian brutality was the Hungarian revolution of 1956. At least 125,000 Hungarians were casualties in this heroic revolt; of this number 25,000 gave their lives.

The number of people who have "voted with their feet" by escaping to the West from behind the Iron Curtain testifies to the brutality with which the Communists treat those who attempt to co-exist with them. The numbers are as follows (as of 1960):

East Germany	3-4,000,000
Hungary	375,000
Baltic Countries (Latvia, Lithuania, Estonia)	250,000
Poland	210,000
Czechoslovakia	61,000
Rumania	30,000
Bulgaria	9,000
Albania	8,000

In addition, literally millions have been liquidated by Communist China, Russia's untrustworthy ally. These figures belie Khrushchev's bland promises of how easy it is to co-exist with the Communists.

While Mr. Khrushchev is telling representatives of the West and of the neutral nations one thing, he is telling his own people exactly the opposite. A brief scanning of official Communist literature establishes the fact.

> The Proletarian of the Soviet Union harbors no illusions as to the possibility of a durable peace with imperialists. The Pro-

> letarian knows that an imperialist attack against the Soviet Union is inevitable; that in the process of a Proletarian world revolution, wars between the Proletarian and bourgeoise states, wars for emancipation of the world from capitalism, will necessarily and inevitably arise. Therefore, the primary duty of the Proletariat, as a fighter for socialism, is to make all the necessary political, economic and military preparations for these wars, to strengthen the Red army—that mighty weapon of the Proletariat—and to train the masses of the toilers in the art of war. There is a glaring contradiction between the imperialist policy of piling up armaments in a hypocritical talk about peace. There is no such contradiction, however, between the Soviet government's preparation for defense and for revolutionary war in a consistent peace policy. Revolutionary war of the Proletariat dictatorship is but a continuation of the revolutionary peace policy "by other means."[14]

At a speech made at Leipzig in 1959 for consumption by the western world, Khrushchev said: "We are confident that we shall conquer capitalism. We shall conquer it not by war, but by demonstrating practically to all the working people the superiority of communism over capitalism. The working class has a great truth—the teaching of Marxism-Leninism. This truth will triumph."[15]

In direct contradiction to this "soft" approach is the true Soviet definition of peaceful co-existence:

> Peaceful co-existence of states does not imply renunciation of the class struggle . . . the co-existence of states with different social systems is a form of class struggle between socialism and capitalism. In conditions of peaceful co-existence, favorable opportunities are provided for the development of the class struggle in the capitalist countries. Peaceful co-existence . . . does not mean conciliation of the socialist and bourgeoise ideologies. On the contrary, it implies intensification of the struggle of the working class, of all the communist parties, to the triumph of socialist ideas.[16]

From this statement we can glean the meaning Communists attach to peaceful co-existence. It is a time for "an intensification of the struggle . . . of all the communist parties . . . to the triumph of socialist [communist] ideas."

Khrushchev made it clear that "peace" includes certain kinds of war, when he said:

> Now a word about national liberation wars . . . such wars are not only admissible but inevitable . . . . The peoples can obtain

[14]INTERNATIONAL PRESS CORRESPONDENCE, THESIS OF THE VI WORLD CONGRESS OF THE COMMUNIST INTERNATIONAL, No. 84, 1590 (1928).

[15]Speech by Khrushchev before the 9th All-German Conference of Trade Union and Plant Officials, Leipzig, Germany, March 7, 1959, in TASS March 26, 1959.

[16]Statement by 81st Marxist-Leninist Parties, Dec. 5, 1960, in ABA, *op. cit. supra* note 7, at 3-4.

> their freedom and independence only by struggle, including armed struggle . . . . What is the attitude of the Marxists toward such uprisings? A most positive one . . . the Communists fully support such just wars and march in the front rank with the people waging liberation struggles.[17]

This statement illustrates once again how the Communists twist the meaning of words and phrases to fit their propaganda.

Many Americans and other peoples of neutral and western nations find it hard to accept the facts. They are so eager for peace and the end to the cold war that any overtures made along the lines of peaceful competition are eagerly grasped. Many are too willing to believe that there has actually been a change in the Communist line, that the Communists do wish to get along with us. However, a careful examination of all the Communist statements on peaceful co-existence reveals that it is just another ruse in their war for the eventual triumph of communism throughout the world.

The American Bar Association's Special Committee on Communist Tactics, Strategy and Objectives has aptly defined peaceful co-existence as a "blueprint for disruption."[18] Peaceful co-existence serves well the aims of Communists so long as they can make gains under it. Why should they resort to war when under the guise of peacefully co-existing, the Communists can continue to make gains on fronts around the world? They support "wars of liberation" in Southeast Asia. This is illustrated by the "brushfire" wars in South Viet Nam and Laos. They irritate trouble zones such as Berlin and Iran. When the nations of the West seek to alleviate the trouble or end the wars, the Communists are only too happy to suggest that we sit down and negotiate, that we "peacefully co-exist." Then at the negotiating table, if we concede a little each time, the Communists have won their battle and without having to resort to a world war. Matyas Rakosi, a Soviet citizen and former Prime Minister of Communist Hungary, has made an ominous analogy about the demise of the capitalist system. He compared the capitalist system to a large salami, which the Communists will take, not all at once, but only a slice at a time, until it is eventually all gone. Peaceful co-existence is the perfect medium in which the Communists can slice away at the salami.

Each concession, taken alone, may appear to be insignificant. The sum total of many concessions is not insignificant.

Peaceful co-existence is not meant to go on forever. Nikita Khrushchev himself said in 1956: "But of course we must realize that we cannot so co-exist eternally. *One of us must go to his grave.* We do not want to go to the grave. They [western powers] do not want to go to their

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[17]ABA, *op cit. supra* note 7, at 4.

[18]ABA, *op. cit. supra* note 7.

graves either. So what must be done? We must push them to their graves."[19] (Emphasis added.)

The term "peaceful co-existence" then apparently means a suspension of all-out warfare, but a continuation, and indeed an intensification, of the cold war. This will be the Communist strategem so long as it helps them achieve their end, the ultimate victory of communism throughout the world, more efficiently and effectively than open warfare. So long as the Communists can use it to move closer to world conquest without war, they will follow the line of peaceful co-existence.

Let me reiterate that after knowing all of this, many people are still not convinced that the Communists are as callous as the above arguments suggest. These well-intentioned people will eagerly accept at face value the "soft" statements made by the Communist leaders. Such people must be made to realize that a Communist need not stand on his word. If lies will promote the end result of communism, all the better. A promise or a treaty is little more than a scrap of paper, something to be used in the never-ending war with capitalism.

Negotiations and co-existence can be meaningful only if the two sides negotiating and co-existing have certain common convictions and common standards which regulate their relations with each other. Political, legal and moral commitments require a certain amount of natural sympathy between those who are negotiating. The mere fact that there is a point of contention or a point of interest about which two nations can negotiate does not necessarily mean that the issue is negotiable. There must be a modicum of agreement on certain principles of behavior, fortified by agreement on fundamental values and beliefs. We of the western nations base our relations with other men on Judeo-Christian morality. This morality teaches us that a man must be as good as his word, that a promise which is solemnly given is not to be broken. We must remind ourselves that Communist morality is far different from our morality; let us recall once again Lenin's definition of Communist morality:

> We repudiate all morality derived from non-human, non-class concepts. We say that it is a deception, a fraud in the interests of landlords and capitalists. We say that our morality is entirely subordinated to the interests of the class struggle of the proletariat. *Morality is what serves to destroy the old exploiting society and to unite our toilers around the proletariat which is creating a new communist society . . . . We do not believe in eternal morality.*[20] (Emphasis added.)

This fundamental difference between the morality, basic beliefs and values of the western nations and the Communist morality must be kept

[19]Speech by Khrushchev in Warsaw, Poland, 1956 in AMERICAN & FOREIGN POWER CO., THE NECESSITY FOR ALL OF US TO FIGHT (1961).

[20]Thomas, *op. cit. supra* note 9, at 50.

in mind when one examines Communist proposals for peaceful co-existence. Every such overture by the Communists must be examined scrupulously.

Many believe that the Communist policy of peaceful co-existence as espoused by Khrushchev is far more dangerous than the openly tough Stalinist foreign policy. Bertram Wolfe has written: "They know that they are engaged in a war to the finish, a war for the world. Every separate issue, every negotiation, every conference, every utterance they regard as a move in that war, whereas for us in the west, each is treated as a separate concrete issue to be settled once and for all in order that we may relax."[21]

To combat this we must not relax, and we will not if we remember the ultimate objective of international Communism, and remember that every move, every act, every plea for peaceful co-existence is directed toward the achievement of that ultimate objective—victory for world communism and the end of our way of life. We cannot and we will not let this happen.

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[21]Wolfe, *Communism*, 51 Life No. 16, p. 134 (Oct. 20, 1961).

DESTRUCTION OF ALL RELIGION— A GOAL OF COMMUNISM*

There are many people in the world today (some of whom live in the United States of America) who actually believe that communism is simply a different form of government, a different form of economic and industrial organization and that a transition into the Communist State would be one which would not destroy all that we know as the heritage of the centuries enjoyed by us today in the United States of America. They overlook the following three basic differences between communism and liberty under the law with the Judeo-Christian concept of religion:

1. Communism is unalterably opposed to any form of religion, whether it be Christian, Jewish, Mohammedan, or any religion which teaches the existence of God, the immortality of the soul or the principles of morality, honest and fair dealing among men. In every country which has become communistic, every form of religion will be ultimately destroyed as being absolutely and completely antagonistic to the ideology, philosophy and concept of communism.
2. There is no place in any Communist State for private ownership of property. This is not limited to nationalization of certain basic industries or even of all industry, but includes with it, the total destruction of the private ownership of any property whether it be real property or personal property, industry, business, commerce or any other form of the ownership and the utilization of property by any person. All property of every kind and nature, all industries, commerce, title and ownership is vested in the state and is supposed to be held in trust for the people. Communism would completely destroy the concept which we have had through the centuries of property, its ownership and use by individuals as distinguished from a monolithic state.
3. There is no place for honesty, fair dealing, good faith, morality or truth in the Communist philosophy or in any countries which are dominated by the Communist Party.

The people of the United States and of all the free world can have no conception of the true basis and ultimate effect of the contest for world supremacy between the Communists and the free world unless they are able to put themselves in the place of the Communist who is dedicated to bringing about the ultimate goal of Communism, which they call "peaceful coexistence." This may be defined as that state which

*This address was delivered by John C. Satterfield to the Law School of the University of Notre Dame, South Bend, Indiana, May 7, 1962, and to the Seminar on Communist Tactics, Strategy and Objectives, Baton Rouge, Louisiana, May 25, 1962.

will exist in the world when every nation which is not a Communist nation has been conquered by the Communists and every person "murdered" or "subjected to Communist rule." Then, and then only, there will be "peaceful coexistence," as known to communism. The Communists say and believe that peaceful coexistence cannot and will never arise until this state of unanimity is attained by treachery, murder, tyranny, forcible overthrow of all non-Communist governments and the liquidation or enslavement of all non-Communist persons.

Perhaps the first concept which the people of the United States have never attained, is the complete dedication of Communists to destroy religion in all of its forms. This is not confined to the Christian religion, whether Catholic or Protestant, to the Judeo-Christian concept with its moral code as supported both by Christians and by Jews, but it extends to every form of religion in the world today. All those who believe in God, whether they be Christians who believe that Christ is the divine son of God; Jews who believe in God, and that Christ was a great prophet; the Mohammedans who believe in God, who believe in the prophets and that Christ was one of them, but that Mohammed was the greatest prophet of them all, or the other great religions which believe in the existence of God and most of them in the immortality of the soul, all will be destroyed by every possible means, if the Communists reach the state of "peaceful coexistence" which has been defined above.

We need only to turn back the pages of history to realize the tremendous contest of ideas, ideology and religious or non-religious concepts which is now reaching its height, and which will determine the future of the billions of people who now live on this earth, not only in the near future, but for future generations. As I am a Methodist, we might turn back to the days of John Wesley, the Protestant, who founded the Methodist Church. John Wesley, like Karl Marx, related his thinking primarily toward the toiling, struggling, suffering people and their problems. And both men advocated revolution. Here the parallel ends, for John Wesley was a devout man of God, while Marx was a militant atheist.

Wesley called for a revolution of the spirit; Marx called for a revolution of the sword. Wesley appealed to the soul of man; Marx to his body. Wesley would change and improve the social structures by changing and improving men, elevating them to an effective relationship with God. This, he believed, would imbue them with a social consciousness and sense of responsibility for the personal and group welfare of their fellow men. Wesley's motivation was one of love; Marx' one of hatred.

The subject matter of these two men was identical—humanity. But their interpretation and treatment of this subject matter was entirely different. Their philosophical perspectives were diametrically opposed to each other. As powerful historical characters, they are natural

rivals. Therefore, it was no accident that the French historian Elie Halvey posed this provocative question: "A century earlier, John Wesley had defeated Voltaire. Would he defeat Karl Marx?" In a broader contest, we can paraphrase this question to read: "Twenty centuries ago, Jesus Christ defeated the ancient pagans. Will He defeat the modern Communists?"

It is to this question that we shall address ourselves. It is this question around which truly burning issues cluster today, issues which are dividing religious people and weakening the social fiber of our nation at a time when it needs to be strong.

Karl Marx, the founder of communism, wrote 117 years ago:

"Religion is the moan of the oppressed creature, the sentiment of a heartless world, as it is the spirit of spiritless conditions. It is the opium of the people.

"The abolition of religion, as the illusory happiness of the people, is the demand for real happiness . . . ."

Communists explain religion as merely a mass of age-old superstitions engendered in the dim, distant past when people were overawed by elemental and natural forms of phenomena. According to Communists, as religion developed, it gradually became a part of the superstructure resting on economics. Subsequently it served as an instrument of the ruling and exploiting classes. It is still used, Communists maintain, by "predatory capitalists" to hold the masses in abject subjugation. Hence, Communists contend that religion merely serves, as Marx put it, as the opium of the people, since it alienates man from his true self, a materialistic being.

Communists completely reject a belief in God, in morals derived from religious principles, and in the immortality of the soul. Communism is based on dialectical and historical materialism, which arbitrarily excludes all convictions based on faith in God and the theistic interpretation of life.

The modern Communist theory of dialectical and historical materialism, which debars any religious concept, was succinctly enunciated in 1848 by Karl Marx and Friedrich Engels in their *Communist Manifesto,* the bible of world communism. On the subject of religion, the Manifesto holds that (1) no supernatural moral laws, such as the Judeo-Christian moral code, are to interfere with the world-wide Communist revolution, since Communist morality must be based on non-class, non-supernatural principles rooted in proletarian utility; and (2) all religions are, without exception, false and harmful and must necessarily be eliminated, as they delay the revolution.

From Karl Marx to the present day, Communist leaders have echoed the anti-religious concept of Communist ideology and attacked all religion, its works, and its institutions. They have done so with the single purpose of eradicating religious belief and replacing it with worship of

the Communist state under the domination of one monolithic, dictatorial Communist Party.

Vladimir L. Lenin, the principal architect of modern communism, said "Religion is a kind of spiritual gin in which the slaves of capital drown their human shape and their claims to any decent life." Several years later, Nikita S. Khrushchev stated: "We remain atheists. We will do all we can to liberate a certain portion of the people from the charm of the religious opium that still exists."

As recently as September 20, 1961, Khrushchev also said: "As a Communist and an atheist I do not believe in the Lord's will."

Communism is the antithesis of religion, being irrevocably opposed to religion both on philosophical and practical grounds, as shown in an extract from a recent Soviet publication:

> The philosophical basis of Marxism is dialectical materialism—materialism, which is fundamentally opposed to all religion. The Communist Party, basing its activity on dialectical materialism, wages a consistent and implacable struggle against religion.
>
> Religion is an ideological foe of Communism, and the reconciliation of the two is impossible.

Communism simply cannot tolerate freedom of religion and all that it means. No Communist government can allow allegiance to any authority but its own, whether that authority be a Supreme Being, a code of ethics, a body of political and social principles, or merely an individual's respect for his own mind and conscience. To tolerate two authorities would lead to a freedom of choice for citizens, and citizens who are free to choose would be unreliable by Communist standards.

As previously stated, Communist morality is rooted in a total renunciation of a belief in God and the values of the Judeo-Christian moral code. Communists subordinate all morality to the class struggle. To them anything is moral which is related to the revolutionary struggle and which tends to destroy the enemy and to promote communism. Lenin was most explicit when he said: "We repudiate all morality that is taken outside of human, class concepts. Morality is that which serves to destroy the old exploiting society and to unite all the toilers around the proletariat, which is creating a new Communist society."

This position is, of course, based upon the Communist concept that reality itself is revolutionary.

One of the principal reasons why Communists so persistently and vehemently condemn religion is that they claim it undermines the "revolutionary zeal" of workers and detracts from the militant class struggle. According to an excerpt from *Pravda*, a Soviet newspaper:

> Religion, with its anti-scientific affirmations, its morality and its distorted concepts of the surrounding world, handicaps the construction of Communism and diverts some people from vigorous participation in our great work. The residues of religious holdovers are an obstacle in strengthening the friendship of peoples and are conducive to the retention of bourgeois nationalistic sentiments. In a number of instances the performance of religious rituals entails a breach of labor and state discipline, is injurious to the national economy.

Communist hostility toward religion is deep-seated and manifests itself against all religious beliefs and all forms of worship, whether they be Protestant, Catholic, Jewish, or any other. In both theory and practice, Communists make no distinction whatever between the various religious creeds. This fact is shown in the following passages from a book entitled *Religion in the USSR*, written some years ago by the President of the League of Militant Atheists of the Soviet Union:

> The Jewish rabbi, the Roman Catholic priest, the Russian Orthodox priest, the Mohammedan mullah, the Evangelist, the Baptist and other ministers of religion, each has his own way of fooling the people. . . .
>
> All religious organizations, including all sectarian organizations, oppose the correct conception of the world, based upon science . . . and cling to their incorrect ideas, which are based on faith alone. . . .
>
> As to difference between one religion and another, they are of little, if any, consequence.

All forms of Christianity are especially disparaged and denounced by Communists. They reject completely all Christian principles. They deny Christian contributions to Western civilization and to world progress. Some Communists even discount the historical character of the Judeo-Christian tradition, maintaining that it is not important whether or not the Hebrew prophets and Jesus actually existed.

Communists charge that Christianity merely preaches, but fails to act against poverty, social, economic and legal injustices, and neglect of the sick and aged; that it has invariably resisted social and economic reform in favor of the status quo; that it is allied with, and subsidized by, the most reactionary elements of society. Communists, therefore, look upon Christianity as a powerful political enemy:

> The churches have always used their influence and resources to maintain reactionary rulers in power . . . . In all capitalistic countries the workers . . . find the churches directly and indirectly aiding the capitalist rulers.
>
> The doctrines and ritual of the churches are powerful means of developing attitudes of subservience among the workers . . . .
>
> A supernatural power is pictured that will punish workers if they disobey the rules of order and self-respect which their rulers

> have established to keep them docile and obedient. Capitalism and its laws and practices are taught to be God-given creations; it becomes irreligious and wicked to challenge them.

The Communist Party in the United States, which is an integral part of the International Communist Movement, has, as a matter of course, slavishly subscribed and adhered to all Communist tenets and practices. Over the years, the Communist Party in this country has dutifully embraced and reflected Communism's anti-religious concept and tone. Earl Browder and William Z. Foster, both of whom have headed the Communist Party USA, considered Communism to be the ideological foe of religion. Earl Browder made this unmistakably plain when he said:

> The Communist Party takes the position that the social function of religion and religious institutions is to act as an opiate to keep the lower classes passive, to make them accept the bad conditions under which they have to live in the hope of a later reward. From this estimate of the social role of religion, it is quite clear that the Communist Party is the enemy of religion . . . .

William Z. Foster, who died in the Soviet Union in September, 1961, voiced the same sentiments:

> In this era of growing science and industrialization, and of developing dialectical materialism, religious mysteries and metaphysics are quite out of place. We are well into the period of all-embracing realism in which religion plays no living role. It will not be very long before man, completely emancipated mentally from superstition in all of its forms, will marvel as to how and why humanity was able to accept and to tolerate intellectually for all these ages, the rational impossibilities of religion.

But we must do more than realize the complete antagonism of communism toward every form of religion and the fact that in every country which becomes Communist, religion will ultimately be destroyed unless communism itself is destroyed. More important still is that we realize that this is a time for us to re-examine our own democratic concept of man, the time for us to do some soul searching and ask ourselves why there is not more democracy and less communism in the world.

All of us in the free world need to know that much of the Marxian Dream is idealistic. Even the polluted dream, which remained after Lenin, retained many idealistic qualities. The relationship of that dream to modern Communism is seldom realized.

Dr. Charles W. Lowry in his book *Communism and Religion*, said:

> In International Communism we are up against a movement that is not, first of all, economic or military or geopolitical or philosophic, but religious. Communism in our world can only

> be understood and met if we are clear that it is a false and idolatrous but very powerful religious system claiming a monopoly on truth and offering to all mankind a salvation based exclusively on the realities of this world. It offers a scientific, technological, and humanistic answer to all human problems.

Said Marx, in *Das Capital*:

> We can then foresee the advent of social conditions under which everyone will be relieved of the burden of material difficulty and distress. . . . In this society of the future, personal freedom and the well-being of all without exception will, for the first time in history, become realities, and the individual will, at the same time, be able to develop fully his personal aptitudes and capacities.

William Z. Foster was the interpreter of the Marxist Dream for the United States of America as a leader of the Communist Party USA for many years. A brief portion of this interpretation appears in his work, *Toward Soviet America*, published in 1932:

> The proletarian revolution is the most profound of all revolutions in history. It initiates changes more rapid and far-reaching than any in the whole experience of mankind. The hundreds of millions of workers and peasants, striking off their age-old chains of slavery, will construct a society of liberty and prosperity and intelligence. Communism will inaugurate a new era for the human race. . . . [It] will bring about the immediate or eventual solution of many great social problems . . . war, religious superstition, prostitution, famine, pestilence, crime, poverty, alcoholism, unemployment, illiteracy, race and national chauvinism, the suppression of women, and every form of slavery and exploitation of one class by another. . . . Marxians have been able to analyze capitalism scientifically, to work out a correct program and strategy of struggle. . . to master generally the laws of social development . . . and we may be sure that the revolution, in its upward course, will carry humanity to heights of happiness and achievement far beyond the dreams of even the most hopeful utopians.

As a matter of fact and practice, these idealistic principles have been abandoned by Communism as it exists in this world today, but they are used to befuddle and betray the unwary and uninformed.

The democratic concept of man is an affirmation. It is a sagacious blend of Judeo-Christian morality and spirituality fused with Greek rationalism and the Roman sense of law. It results in a process, not an "ism," in a dynamic way of life, not in static regimentation. It is singularly adapted to the transitional nature of human relations, being extracted from the collective experience of the human race.

Democracy affirms the existence of a Creator. It affirms God-given or inherent and unalienable rights as well as the quality of men in essence. Our Declaration of Independence sums up this truth well, start-

ing with the premise of "the laws of Nature and of Nature's God" and concluding with: "We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and pursuit of of Happiness."

Democracy, therefore, affirms the intelligible transcendental origin, purpose and destiny of man. "This world's no blot for us, nor blank; it means intensely, and means good; To find its meaning is my meat and drink."

To find its meaning is to make complete self-development through freedom possible, and this is the end of man. Democracy is the road to this end because it affirms freedom of will without which all other freedoms are impossible. Man must first be free to choose between alternatives before he can choose to erect and maintain a free society. He must be free to be responsible for his conduct, for otherwise a system of jurisprudence, as well as democracy itself, would be farcical. It affirms the innate dignity, value and sacredness of every human personality irrespective of race, color, creed, economic worth, or social status. It affirms the capacity of every individual, personally and socially, to be self-determining and self-governing. It affirms the rule of law consonant with ethical norms. It affirms the right to education and self-realization. As was once said: "Preach, my dear sir, a crusade against ignorance; establish and improve the law for educating the common people."

It affirms freedom of thought, of conscience, of religion, of expression, and of action. It affirms social justice. It affirms the peaceful organization of society for the common good. It affirms the perpetual revolution of the spirit, which alone is the only genuine revolution. Lastly, democracy affirms the vision of man who is in the world, but not wholly of it, a man who can look beyond the ephemeral to focus his vision on, in the words of Tennyson: "One God, one law, one element and one far-off divine event, to which the whole creation moves." This is democracy's last all-encompassing affirmation, which contains the others. Purpose is written into the heart of democracy.

These are the great democratic affirmations. They constitute our ideological weapons with which we can defeat Communist negations. The issue is already joined in the mind of man. And, contrary to Communist ideas, man, not economic forces, is still dominant in history. When the modes of production are changed, it is man who changes them. When the tools of sustenance are made, it is man who makes them. It is man who, in the main, creates and changes the decisive conditions of his material environment. This is not to minimize the very apparent importance of economics as one major factor in history. It is

only to say that man preceded the economic modes; he shapes them to be what they are, for good or for bad. Man was created to create and, when he ceases his creativeness, he ceases to be a man. This state, fortunately, has not yet been reached although it may come to pass.

It may come to pass for the lack of an inspiring conviction in the democratic concept of man. Apathy is the death of virile convictions.

Those of little faith will always lose to those whose faith is great. The confused, the doubters, the apathetic cannot hope to successfully overcome communism. They cannot hope to successfully build a democratic world. They do not have the necessary convictions and, where conviction is lacking, the will is weak. Where the will is weak, necessary self-sacrifice will be avoided.

It has been said that "Nature abhors a vacuum." This applies not only to the physical world, but to the mind. There are two pressing, derivative social problems in the world today—communism and democracy. The former will recede only if the latter expands. The solutions rest with the leaders of men taken from the masses, from the ranks of our people.

These leaders must be capable of doing two things simultaneously. First they must analyze the malignant social movements of the extremes and their devastating evils and expose them mercilessly to the people. This means the extremes of any kind, from any angle. FBI Director J. Edgar Hoover has said:

> Knowing what Communism really is and how it operates will . . . help us to avoid the danger of confusing Communism with legitimate dissent on controversial issues. Communism feeds on social ferment. On both the local and national levels, the Communist Party, USA, is continually exploiting social, economic, and political grievances for its own tactical purposes. For this reason, the "Party line" will frequently coincide with the views of many non-Communists on specific issues. We must not, therefore, indiscriminately label as Communists those whose opinions on a particular question may, on occasion, parallel the official party position. We must also guard against the tendency to characterize as Communists those who merely disagree with us or who advocate unorthodox or unpopular beliefs.

Democracy must not destroy itself in its own defense. In defending the democratic concept of man and its application, we must at all times be democratic. This means we must proceed according to both the spirit and the letter of the law. We must, without exception, keep within our constitutional framework. There are no short cuts to justice. We must not violate the rights of others. We must avoid sowing seeds of hate, distrust, and suspicion among ourselves.

We cannot destroy the deadly social evil of communism through

confusion, doubt, and division. This challenge must be met by unified, calm, rational, and enlightened action. The basic issues in this global struggle are intellectual, moral, and spiritual. Therefore, truth and justice are paramount. Only through a dynamic movement of faith and good works in communities can the vision that truth and justice engender be transformed into the practical realities. These are the realities which will preserve and foster the free, open society with equal opportunities for every person to achieve self-realization.

JUSTICE FOR YOUTH THROUGH LAW— SOME OBSERVATIONS ON THE JUVENILE COURT*

I. Introduction

A popular misconception concerning the juvenile courts is that proceedings therein are criminal proceedings set up as punishment for crimes committed. The National Council of Juvenile Court Judges adopted on May 23, 1940, a six point statement clarifying the nature of juvenile courts. It read as follows:

> (1) The juvenile court is designed within the scope of its legal powers, for the care and protection of dependent and neglected children; for safeguarding the interests and enforcing the obligations of responsible adults; and for the correction, re-education, re-direction and rehabilitation of delinquent youth.
>
> (2) The juvenile court, although considering social consequences of its action, must recognize and protect the rights of those brought before it as provided by law and the constitution.
>
> (3) The juvenile court is a tribunal with jurisdiction to proceed informally and charged with the duties of diagnosing difficulties upon hearing aided by pre-hearing investigation, of determining disposition, prescribing treatment and directing supervision.
>
> (4) The juvenile court is limited both by the laws controlling its organization and jurisdiction and by the community facilities that are made available to it for carrying out the constructive treatment that it finds necessary to prescribe.
>
> (5) The juvenile court should be housed in quarters separate and apart from criminal and other courts, in surroundings assuring dignity and the necessary privacy and should be furnished with the staff and equipment to adequately discharge its function.
>
> (6) The juvenile court is not charged primarily with delinquency prevention activities, but the presence and prestige of the court act persuasively in this respect and the educational work of the court, together with the activities of the court's probation staff, tend to exert preventive influences.

These, I think, are sound principles. In the course of this article, I should like to explore some of the background and antecedents which underlie them and offer a few observations which may contribute to

*This article is based on Mr. Satterfield's address delivered as President of The American Bar Association at the Twenty-Fifth Annual Conference of the National Council of Juvenile Court Judges, Cleveland, Ohio, June 26, 1962.

placing the juvenile courts in their proper and deserved perspective in the institutional framework through which law and justice are today administered in our democratic society.

II. The Situation Today

It would do well, at the outset, to be reminded of the ever present and, indeed, inevitable gap between principle and practice which characterizes the affairs of men in their efforts to live and strive together. This, of course, is no less true of the juvenile courts than of other fields of endeavor and would no doubt exist even if there were universal agreement (as there is not) about what these tribunals are and how they should be operated.

For example, we frequently fail to realize that our juvenile courts and their judges are limited by the organizational structure set up under the statutes, by the funds provided from public sources and by the community facilities which are available for their use. In many of our states it is recognized—and properly so—that there should be separate facilities apart from the criminal court because of the different nature of the juvenile court bench to do more completely the job which it is anxious to do in a perfect way.

Of course, the courts as such are not charged primarily with the prevention of delinquency except to the extent that delinquency has occurred and they seek to prevent it from recurring but nevertheless, it is unofficially a part of the juvenile court judge's function to aid every community activity and assist in the prevention of juvenile delinquency.[1]

The dynamics of delinquency and youth crime alone tend to frustrate our continuing efforts to perfect our machinery for the administration of justice for youth. As has been pointed out by the National Council and others, referrals to juvenile courts of America increased in 1960 for the twelfth consecutive year. One–third of our present population is today eighteen years of age or younger and the vulnerable delinquency age from ten to seventeen will increase by one-third in this decade. Moreover, it is anticipated that during the 1960's we can expect more than 4,000,000 children to come before the juvenile courts of the United States.[2]

It is, of course, of great moment to all of us when we realize that in 1940 an estimated one per cent of the youth between ten and seventeen

[1]Juvenile court judges have taken leadership in a number of preventive programs throughout the years, both individually and through their national and state organizations, one of the more recent examples being the well organized statewide protective services program of the Michigan Association of Juvenile Court Judges conducted through the Children's Charter of the Juvenile Courts of Michigan, Inc.

[2]See, President's Committee on Youth Crime and Delinquency, *Juvenile Delinquency: The Scope of the Problem* (July 1961).

came before the courts, some 190,000. In 1955 this had increased to two per cent or some 400,000 and in 1958 to 2.2 per cent or 480,000 and even that is increasing. That does not mean that our courts are not doing only a good job, but a better job from year to year. It does mean, however, that the needs are increasing and that we and all of us should do something about it.

III. Some Historical Observations

I think it is of interest and some value to look back just a little over the history of the juvenile courts. Most acquainted with the field are familiar with the fact that the first juvenile court in the United States was created as a separate institution in Chicago, based on a law enacted on March 26, 1899.[3]

The pioneer Illinois legislation was the first recognition by statute of the necessity of a separate court in the United States and, perhaps because of this, people sometimes seem to think that the matter of a juvenile court is a rather recent thing. This is far from being true because from very early time in England, children were regarded as wards of the Crown under its protection. To give substance to this concept, there was set up a separate court in England during the reign of Henry VIII which was known as the Court of Wards and Livery. In 1660 that court had its jurisdiction transferred to the Courts of Chancery and in these courts the king acted in his capacity as parens patriae under duty to protect and care for infants, with initial concern focusing on property rights. Soon after the transfer of jurisdiction was made to the chancery courts, jurisdiction was extended not only over infants generally but also to lunatics and all others under disability.[4]

It is interesting to see in 1722 in *Eyre v. Shaftsbury*, one of the first holdings of the highest court of England was to the effect that "the king is protector of all of his subjects; that in virtue of his high trust, he is more particularly to take care of those who are not able to take care of themselves, consequently of infants who by reason of their nonage are under incapacities . . . ."[5]

Throughout the years in England, this was the law and the rule. As a matter of fact, the poet Shelley in *Shelley v. Westbrooke* in 1821 was held to be an immoral father.[6] He had acknowledged he was an atheist, and the court in the capacity of parens patriae, took his chil-

[3] Ill. Stat. Ann. § 2001-36 (1958) (current citation of original act, as amended.)

[4] See Nicholas, *History, Philosophy and Procedures of Juvenile Court*, 1 J. Family Law 151 (1961), for a detailed and thorough treatment of the historical development of the juvenile court and its conceptual basis.

[5] 2 P. Wms. 103, 24 Eng. Rep. 659, 666 (Ch. 1722), involving a contest between guardian and natural parent over control of child.

[6] 1 Jacob 266, 37 Eng. Rep. 850 (Ch. 1821), where the protection of Crown extended to religious upbringing of children.

dren away from him and put them under the care of the court based on the determination that he was not a fit father to care for his own children.

These principles were recognized and have been recognized for many years in the United States. Perhaps one of the first cases in the United States which sets forth this philosophy was the case of *Ex Parte Crouse*.[7] In the *Crouse* case, in which the constitutionality of commitment to institutions which we now know as reformatories, training schools, and so forth, without jury trial was in issue, the Supreme Court of Pennsylvania held:

> The House of Refuge is not a prison, but a school. Where reformation, and not punishment, is the end, it may indeed be used as a prison for juvenile convicts who would else be committed to a common gaol; and in respect to these, the constitutionality of the act which incorporated it, stands clear of controversy. It is only in respect of the application of its discipline to subjects admitted on the order of the court, a magistrate or the managers of the Almshouse, that a doubt is entertained. The object . . . is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates.[8]

These doctrines expressed by the Supreme Court of Pennsylvania in the year 1839 have been the basis of similar holdings for many years by other courts of our country.

Another decision of interest was rendered in 1881 before the Supreme Court of Ohio. Here it was stated, with reference to the commitment of three children to a "house of refuge" under the juvenile acts then existing (and this was prior to the setting up of juvenile courts as separate institutions):

> The commitment is not designed as a punishment for crime but to place destitute, neglected and homeless children and those who are in danger of growing up idle and vicious members of society under the guardianship of public authorities for their proper care and to prevent crime and pauperism. As to such infants it is a home and a school, not a prison . . . ."[9]

The foregoing does not pretend to be a comprehensive summary of the historical development of juvenile court concepts. It does attempt to convey some impression of the old and honorable antecedents of today's achievements. The people of the United States should realize that when we establish juvenile courts and when we apply these principles

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[7] 4 Whar. 9 (Pa. 1839).

[8] *Id.* at 11.

[9] House of Refuge v. Ryan, 37 Ohio St. 197 (1881), where habeas corpus on claim of no notice to parent denied.

in the administration of their business, this is no new thing. This is not the application of some new psychological theory or child behavior doctrine to children. Rather it is a principle which has been recognized since before the United States became a nation and has been embodied in the laws of our states from that day to this. Perhaps the only basic innovation is that there have been set up separate courts for delinquent and neglected children and this is a tremendously important and tremendously beneficial innovation.

IV. Civil Versus Criminal Nature of Delinquency Proceedings

There are two other matters which, in my view, merit attention in this important field. The first is that since it has been repeatedly held that a proceeding in a juvenile court under the usual statute is not a criminal proceeding but a civil proceeding,[10] the courts have recognized that there may be a degree of informality, and a dispensing with certain procedural elements which in a normal criminal proceeding would be deemed to fall short of the requirements of due process of law to which an offender is entitled. Much has been written on this subject and I would say that it has been perhaps the greatest area of interest shown by our legal scholars.

By the way of example, it has been repeatedly held that there is no such thing as double jeopardy arising from a proceeding under the ordinary juvenile court statute or juvenile statute, as against and parallel with a criminal proceeding arising from the same offense.[11] Also, it is the general rule that due process does not require a jury trial in juvenile proceedings unless so provided by the act of the state involved; in which case, jury trial would become a part of due process as defined by that particular legislation.[12]

My own view is that generally the statutes concerning juvenile offenders provide for (or implicitly require) "due process," but that the particular prerequisites of due process or procedural adequacy or

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[10]Among some of the better recent articles on the subject are Antieau, *Constitutional Rights in Juvenile Court*, 46 Cornell L.Q. 387 (1961); Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 Crime & Delinquency 97 (1961); Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547 (1957).

[11]*E.g.*, People v. Silverstein, 121 Cal. 2d 140, 262 P.2d 656 (1953); *In re* Santillanes, 47 N.M. 140, 138 P.2d 503 (1943); *In re* Smith, 114 N.Y.S.2d 673 (Dom. Rel. 1952); Dearing v. State, 204 S.W.2d 983 (Tex. Crim. App. 1947).

[12]There is no federal constitutional right to trial by jury in state court. Brown v. New Jersey, 175 U.S. 172 (1899), and most state courts have held state constitutional guaranties of trial by jury inapplicable to juvenile court hearings, usually as not being criminal proceedings but even in cases where there is a constitutional right to jury trial in civil cases. See cases cited in Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387 (1961).

whatever term you wish to employ to express the basic measure of fairness which must underlie the administration of any law, civil or criminal (particularly where personal liberty, whether of adults or children, is involved) can quite properly and within limits vary according to the nature of the proceedings and even between courts of different states. This is a lesson which the juvenile courts are learning well, and it is gratifying to see new norms of fairness and concern for individual rights evolving from the nation's juvenile courts which preserve our basic ideas of "due process," but at the same time do not sacrifice the elements of informality, treatment-orientation and nonadversary concern for the welfare of children which are so important to effective work in this area.[13]

My second concern stems from my feeling that justice for delinquent and neglected children is an area peculiarly for administration by state and local courts, particularly because of the important role that correction and treatment by state and community agencies and resources must play if any real progress is to be made in meeting head-on the epidemic-like rise in delinquency rates which threatens our nation in the sixties.

Although administration of juvenile courts has always been recognized as within the jurisdiction and function of state judicial systems (with certain limited exceptions), I see some danger that under recent decisions of the federal courts an undue measure of supervision of these procedures may be imposed under strained constructions of the due process and the equal protection clauses of the Constitution of the United States. It would be unfortunate, with the excellent results that many of our juvenile courts are producing and with the varied approaches being worked out in different states to the many problems in this field for which we do not as yet have final answers, if rigid procedural techniques were forced upon our juvenile courts based on the interpretation of federal courts as to the requisites for maintenance of "ordered liberty" in such proceedings.[14]

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[13]ADVISORY COUNSEL OF JUDGES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, PROCEDURE AND EVIDENCE IN JUVENILE COURTS (1962). This work, admittedly representing a swing of the pendulum toward increased concern with procedural fairness for the juvenile offender, nevertheless seeks in a creative way to devise standards adequate to the needs and characteristics of juvenile courts without blind adherence to criminal due process rules which might impair effective processing and treatment of juvenile offenders.

[14]The one area where federal appellate review has had substantial impact to date lies in appeals taken from the Juvenile Court of the District of Columbia. Here, we find a number of decisions which, in terms of procedural rigidity, are at odds with prevailing views in most state juvenile courts, *e.g.* Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956) (right to counsel); Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1961) (right to bail).

The juvenile court judge is performing one of the most important functions in our whole legal and judicial system. He merits the complete and wholehearted support of his brothers on the bench and his colleagues in the legal profession. Having recently completed my term as president of the American Bar Association, I can say that these sentiments echo the feelings of an ever increasing segment of the nation's lawyers. This is good because the task which confronts our juvenile courts is an enormous one. No group should be more aware of its importance and critical relationship to our nation's well-being than the profession whose business, preoccupation, and contribution is making the wheels of justice turn for all Americans, young and old.

WARNING SIGNALS BY MEMBERS OF THE SUPREME COURT—ARE WE IGNORING THEM?*

One of the wisest foreign observers of the political and social scene in America, Alexis de Toqueville, observed over a century ago that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[1]

As was recently said by Mr. Justice Frankfurter:

> The Court was of course from the beginning the interpreter of the Constitution and thereby, for all practical purposes, the adjuster of governmental powers in our complicated federal system . . . . It is essentially accurate to say that the Court's preoccupation today is with the application of rather fundamental aspirations and what Judge Learned Hand calls "moods," embodied in provisions like the due process clauses, which were designed not to be precise and positive directions for rules of action. The judicial process in applying them involves a judgment on the processes of government. The Court sits in judgment, that is, on the views of the direct representatives of the people in meeting the needs of society, on the views of Presidents and Governors, and by their construction of the will of legislatures the Court breathes life, feeble or strong, into the inert pages of the Constitution and the statute books.
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> Such functions surely call for capacious minds and reliable powers for disinterested and fair-minded judgment. It demands the habit of curbing any tendency to reach results agreeable to desire or to embrace the solution of a problem before exhausting its comprehensive analysis. One in whose keeping may be the decision of the Court must have a disposition to be detached and withdrawn. To be sure, these moral qualities, for such they are, are desirable in all judges, but they are indispensable for the Supreme Court. Its task is to seize the permanent, more or less, from the feelings and fluctuations of the transient.[2]

The varied subjects which now come before the Court include procedure and administration; matters involving judicial skill and efficiency; the relation between the legislative and executive; the whole spectrum of law enforcement; the military and administrative branches in the exercise of their power; the supervision of, and interplay with the processes of other courts in the judicial system; the balance and imbalance of the power of the state and nation; the appraisal of the constitutional provisions with careful regard for national needs and

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*This address was delivered by John C. Satterfield before a meeting of The Pennsylvania Bar Association, Atlantic City, New Jersey, June 29, 1962.

[1]American Communications Assoc. v. Douds, 339 U. S. 382, 415 (1950).

[2]Frankfurter, *The Supreme Court in the Mirror of Justices*, U. Pa. L. Rev. 781, 791-93 (1957).

individual freedoms and the application of a wise discretion in the dynamics of the law. Recently there has been a growing participation in the ideological storms and the international conflicts which impinge on the very life of our nation, gradually going far beyond true constitutional and legal questions.

The scope of problems is vast, and in some instances the price of erroneous decisions has been and can be terrible.

In easier and less precarious days, the bar of this country might go its private and more pleasant way. But times of trial are upon us. Now each and every one of us must separate himself and give thought and time to the public weal. And in no more fitting and effective fashion can he do so than to sympathetically and effectively view, appraise, criticize, and assist the courts in creating and administering the law of our land, justly and with wisdom and foresight.

The enormous burdens that the court carries should be uppermost in our minds when we criticize a particular decision or series of decisions. Dean Griswold of the Harvard Law School has said:

> I do not want to minimize the difficulties. Though it is clear that judges do "make law" and have to do so, it remains the fact that this is, at its best, an understanding process, not an emotional one, a self-effacing process, not a means of vindicating "absolute convictions." It is a process requiring great intellectual power, an open and inquiring and resourceful mind, and often courage, especially intellectual courage, and the power to rise above oneself. Even more than intellectual acumen, it requires intellectual detachment and disinterestedness, rare qualities approached only through constant awareness of their elusiveness, and constant striving to attain them. If one regarded himself as having a special mission to fulfill, or if he were quite largely the prisoner of his absolute convictions, he would not meet the highest standards of judicial performance. When decisions are too much result-oriented, the law and the public are not well served.
>
> Our judges carry a heavy burden. They make a supreme contribution in our society. They are entitled to our thoughtful and respectful consideration as they carry out their difficult task . . . .[3]

The Supreme Court of the United States, its Chief Justice and Associate Justices, and its decisions have never in the history of the United States been immune from criticism—temperate or intemperate; constructive or destructive. This history of criticism is consistent with the American philosophy that no institution nor individual in a democratic society should be unfettered by obligations to the people. Indeed in our society judges are not only *sub lege et deo*, to use Lord

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[3]See Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 93-94 (1960).

Coke's famous answer to James I, but there is real foundation for the belief that the Court considers itself *sub populo.*

Members of the Supreme Court have stressed the need for criticism of the Court and its justices. Mr. Justice Brewer voiced one of the early requests for criticism when he said in 1898:

> It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism . . . True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death.[4]

Chief Justice Harlan F. Stone emphasized the fact that criticism need not invoke "any lack of respect for the courts." He said:

> I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it.[5]

Dean Griswold of Harvard has deplored the decline in the professional criticism of the court.[6] He hailed Professor Wechsler of Columbia for the reinvigoration of professional criticism reflected in Wechsler's "Toward Neutral Principles of Constitutional Law," which was delivered on April 7, 1959, as the Oliver Wendell Holmes Lecture at the Harvard Law School. Professor Wechsler's lecture has elicited a new dialogue on old constitutional themes. One recent commentator has stated: "The volume of responsible criticism that Mr. Wechsler's paper on 'Neutral Principles' has produced is nothing short of the most genuine kind of tribute to him."[7]

A true judicial body such as our Supreme Court not only permits but welcomes the aid of lawyers in the common endeavor toward justice under law. Criticism, thoughtful and well intentioned, cannot justify resentment on the part of any member of the Court.

Justice Douglas has stated picturesquely: "Judges are supposed to be men of fortitude, able to thrive in a hardy climate."[8]

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[4]Brewer, *Government by Injunction,* 15 National Corporation Report 848, 849 (1898).

[5]Quoted in a preface to the SUPREME COURT REVIEW (1961). It was earlier quoted in the *Preface* to SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 5 (1957).

[6]Griswold, *Of Time and Attitudes, Professor Hart and Judge Arnold,* 74 HARV. L. REV. 81 (1960).

[7]Bickel, *The Passive Virtues,* 75 HARV. L. REV. 40, 45-46 (1941).

[8]Craig v. Harney, 331 U.S. 367, 376 (1947).

Justice Frankfurter, on the other hand, has emphasized that they are human. He said: "To deny that bludgeoning and poisonous comment has power to influence, or at least to disturb, the task of judging is to play make believe and to assume that men in gowns are angels."[9] Be judges hardy or human, they accede to the bar a full measure of freedom.

The Supreme Court, very recently, has shown itself tolerant of criticism, even where of questionable motive. In the recent case of *In re Sawyer*,[10] the Court reversed a suspension of defense counsel in a Smith Act prosecution, who, during pendency of the trial, addressed a public rally sponsored by the International Longshoremen's and Warehousemen's Union to which most of the defendants belonged and which supported the defense effort. The accused defense counsel declared in her speech that "shocking and horrible things were going on at the trial," such as promotion of perjury by the government, and that the trial was unfair and "rules were made as they go along."

Mr. Justice Brennan for the majority of the Court interpreted the speech as a generalized attack on conspiracy trials and Smith Act prosecutions and not on the integrity of the judge or his conduct of the trial. He stated: "Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed . . . . The public attribution of honest error to the judiciary is no cause for professional discipline in this country."[11]

Mr. Justice Frankfurter, speaking for a four Justice minority of the Court, more realistically characterized the lawyer's action as an inflammatory public attack on the judicial conduct of the trial during its progress, constituting gross misconduct. He declared that to take as the only reasonable inference that the remarks were directed against the conduct of the prosecution of the law of evidence in the abstract "is really asking too much from judges, even if we accept Mr. Justice Holmes' view that judges are apt to be naif, simple-minded men."[12] He said: "Certainly, Courts are not, and cannot be, immune from criticism, and lawyers of course may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so."[13] He continued: "Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice."[14]

Pointedly quoting from a New Jersey court opinion, he emphasized the special role of the lawyer to guard the integrity of the law,

[9]Pennekamp v. Florida, 328 U.S. 331, 359 (1946).
[10]*In re* Sawyer, 360 U.S. 622 (1959).
[11]*Id.* at 635.
[12]*Id.* at 662.
[13]*Id.* at 669.
[14]*Id.* at 666.

and asserted the public attack on a court and the conduct of a trial by counsel during its pendency was a betrayal of that role, and that such conduct cannot be given constitutional sanction.

Though the Justices interpreted the action of counsel in various lights, none gainsaid the opening words of Justice Douglas' opinion, "We start with the proposition that lawyers are free to criticize the state of the law."

I have belabored the *Sawyer* case for serious reasons. More importantly, it points up the right and duty of members of the bar to searchingly criticize the state of the law and its current enunciation by the courts. In this pursuit, I believe there should be no hesitancy or timidity. Rather, in the words of Mr. Justice Frankfurter, I urge criticism as a special responsibility of lawyers which they must exercise fearlessly, even if they thereby "castigate courts and their administration of Justice." Provided, always, that respect is maintained for the Court as an institution and for the individuals who comprise the Court.

We must remember that although some decisions of the Supreme Court may be erroneous and their effect upon our nation may sometimes be calamitous, every member of the Court has dedicated his life to the service of our country and within his knowledge, ability and experience, is striving to serve what he believes to be its best interests.

Equally, I stress in the words of Mr. Justice Stewart that lawyers, as members of "a profession with inherited standards of propriety and honor," must exercise their critical function thoughtfully, dispassionately, and within the bounds of professional propriety.[15]

Faith in the legal process assumes above all an alert bar, a bar standing as the advocate of sound decision, and as the informed critic of the unsound. It is the inherent right and the highest duty of the bar to analyze, criticize, make recommendations, and work toward improvement in both the rulings and the operation of courts, from the lowest to the highest level.

Its right flows inevitably from the lawyer's status of citizenry, and it is underscored and emphasized by his professional standing and his devotion to juridical science. The application of a young manhood to a study of precepts of the law and the consecration of a lifetime thereafter to its pursuit, application, and wise administration gives to every lawyer the unquestioned duty, extending even beyond the limits of a privilege, to scrutinize judicial processes.

As a self-respecting individual he must speak with candor, and as a morally disciplined member of a profession he must speak with fairness. Such is the meaning of the canon of ethics which governs his conduct before Courts and with other lawyers. Equally, it bears upon

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[15] *Id.* at 646.

his thoughts and expressions in his private sanctum and in the public forum.

Candor and fairness necessarily bear with them an attitude of respect for the object of one's comment. But for even higher and more compelling reasons the lawyer must keep explicit in his mind and expression a full measure of respect in addressing himself to the courts. The respect required of a lawyer must be that of a disciple of an ancient profession, of the bearer of a learned tradition, and of the advocate of an ever-widening rule of justice.

The canons of ethics in stating that this respect is "not for the sake of the temporary incumbent of the judicial office" delimits the obligation. Respect is due the person of the Court as well as the institution, be he one who holds the honored place for a fleeting and defined term of years, or one who is selected to devote a space of a lifetime to the office. He is both of us and above us; he is one of the chosen few.

The purpose of the canon, however, is not to deprecate the person of the judge as a "temporary incumbent," but to emphasize the grandeur of the judicial institution and its importance overwhelming the individual. Respect, it states, must be directed to the Court "for the maintenance of its supreme importance." No lawyer can overlook this prime duty towards the institution of the courts in all their levels of power. The courts are the highest symbol of law and justice.

How can a lawyer penetrate "the endless web" of the law which enshrouds the persons and process of the great Court? The answer is so simple as to be startling.

Read its opinions, and especially the opinions of Justices moved to dissent and one has laid before him a panorama of issues, problems, criticisms, and suggestions unparalleled in even the most divided contemplative body, legislative, executive, administrative, diplomatic, or otherwise.

The connoisseur of the dialectic will be enthralled; the student of personality will be intrigued by revelations of the written, and often suppressed, word; the novice at the law will be dismayed at the complexities and uncertainties of thought. The lawyer, however, will be enchanted at the broad vistas opened at the borderline of the law, at the growth and movement of law in the making, at the intellectual stimulus, the sparks arising from the clash of trained minds.

Above all, the lawyer intent on seeking out the issues that confront the law and the problems of both decision and operation which beset its highest expounder, the Supreme Court, will be richly rewarded. In our time he will have filtered through for him enough current issues and problems legalistic, juridical, procedural, operational, social, economic, psychological, and governmental to furnish him endless study.

Here we have no time to discuss in detail the many trouble spots

and areas of dispute revealed by the words of the court critical of its own rulings and processes. Some of these were doubtless in the mind of Mr. Justice Brennan in his statement in the *Sawyer* case when he said, "Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed."

Paging through the cases one is confronted with literally hundreds of instances where expressions of opinion by one or more Justices give pause for inquiry. For example, Mr. Justice Jackson in a maritime case characterized the Court's ruling as "illogical, contrary to any decisional law and not consistent with the scheme of Congress."[16] Mr. Justice Douglas deemed a ruling on habeas corpus as "a grave miscarriage of justice involving an invasion of federal rights guaranteed by the Fourteenth Amendment";[17] Mr. Justice Clark declared that the Court in its ruling on the President's Executive Order on government employee security "has striken down the most effective weapon against subversive activity available to the government."[18] The same Justice protested postponement and reargument over a period of five terms of Court of the Smith Act and Internal Security Act cases as "unprecedented";[19] Mr. Justice Harlan in protest against the Court's overruling of state bar examiners' actions said that the Court was acting "as if it were a super state court of appeals."[20] Chief Justice Warren, in dissenting to the use of information from undisclosed sources in deportation cases, stated that ". . . this case is not the first one in recent years where arbitrary power has been approved and where anonymous information has been used to take away vital rights and privileges of people."[21] He referred to the procedure as "not consistent with the principles of a free country," and the adoption of the "techniques of tyranny." Mr. Justice Frankfurter, supported by three other Justices, objected to the discarding of the "silver platter rule," declaring the Court "overturns a rule of evidence always the law and formally announced in 1914 by a unanimous Court . . ." and "is not supported by any of this Court's previous decisions, while raising serious difficulties in its application, including undue conflicts with state law and with state courts."[22]

These and scores of similar statements in many areas of the law present serious charges made by members of the Court itself which it is incumbent upon members of the bar to examine and appraise.

Especially is this so when members of the Court in case after case accuse it of failing to use sound legal reasoning, of making "mountains

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[16]Pope and Talbott, Inc. v. Hawn, 346 U.S. 406, 423 (1953).
[17]Durley v. Mayo, 351 U.S. 277, 291 (1956).
[18]Cole v. Young, 351 U.S. 536, 569 (1956).
[19]Scales v. United States, 361 U.S. 952 (1960).
[20]Konigsberg v. State Bar of California, 353 U.S. 252, 277 (1957).
[21]Jay v. Boyd, 351 U.S. 345, 367 (1956).
[22]Elkins v. United States, 364 U.S. 206, 233 (1960).

out of molehills,"[23] of "making a rule to fit a case,"[24] of having "the tail wag the dog,"[25] of "not making sense,"[26] of "talking in riddles,"[27] of "misconceiving issues,"[28] of "abusing legal principles,"[29] of using "empty logic,"[30] of making "fragile assumptions,"[31] of coming to "abrupt unreasoned conclusions,"[32] of "misconceiving the authorities,"[33] of being "silent"[34] on relevant authorities, and of relying on cases "not in point, nor in any way controlling."[35]

Allow me to assure you that I would not be so bold as to coin these expressions or initiate the thoughts. I report them as they appear in the printed opinions of these Justices of the Court.

Should the legal profession today voice constructive criticism of decisions of the Supreme Court? The affirmative answer to this question is found in the dissenting opinion of Mr. Justice Frankfurter, in which Mr. Justice Harlan joins, to the recent case of *Baker v. Carr* which presents in its finest tradition a broad basis of the criteria upon which constructive criticism should be grounded. Mr. Frankfurter states:

> The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex. Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court's "judicial power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the

[23]Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 465 (1955).

[24]Yates v. United States, 354 U.S. 298, 349 (1957).

[25]United States v. International Boxing Club, 348 U.S. 236, 251 (1955).

[26]Arroya v. United States, 359 U.S. 419, 433 (1959).

[27]The Monrosa v. Carbon Black Export, 359 U.S. 180, 184 (1959).

[28]St. Joe Paper Co. v. Atlantic Coast Line R.R., 347 U.S. 298, 321 (1954).

[29]Northern Pacific Ry. v. United States, 356 U.S. 19 (1958).

[30]Romero v. International Terminal Operating Co., 358 U.S. 354. This phrase was used to describe the minority view. Other phrases used by various dissenting Justices in this case to describe the majority view were "insubstantial" reasoning, "gross anomaly," "manufactured" exceptions, "futile speculation," "unprecedented" action.

[31]Elkins v. United States, 364 U.S. 206, 243 (1960).

[32]Mitchell v. Vollmer & Co., 349 U.S. 427, 434 (1955).

[33]United States v. Parke Davis & Co., 362 U.S. 29, 52 (1960).

[34]Talley v. California, 362 U.S. 60, 70 (1960).

[35]Greene v. McElroy, 360 U.S. 474, 512 (1959).

> Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed neither of the purse nor the sword—ultimately rests on sustained public confidences in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.[36]

As members of the legal profession, we must remember and act upon the words of Chief Justice Harlan F. Stone: "When the Courts deal, as ours do, with great public questions, the only protection against unwise decisions,—and even judicial usurpation,—is careful scrutiny of their actions and fearless comment upon it."

There was once an ostrich which stuck its head in the sand. We do not know the result of such action. We, like the ancient ostrich, are keeping our heads in the sand. But the reason for such action is quite different from the motivation of the well known bird. It seems that the ostrich was motivated by fear. The legal profession is motivated by either lack of interest, lack of knowledge, or unwillingness to take time from its personal and private business to attend to affairs of the nation. We do not yet know the ultimate result of such inaction. Our children will.

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[36]Baker v. Carr 369 U.S. 189, 266-67 (1962).

LAW AND LAWYERS IN A CHANGING WORLD*

I. Introduction

Lawyers look at our changing world and realize that there are two grave threats to the continued existence of the United States of America as we have known it for almost two hundred years. These threats, in the absence of nuclear holocaust, will continue for the next fifty to one hundred years. The first is the communistic blueprint for conquest drafted by Marx and Lenin, implemented by Stalin and being carried forward by every available legal and illegal means by Khrushchev. The second is the process now quietly but rapidly going forward through which the "indestructible Union, composed of indestructible States" by the Constitution of the United States, as adopted and amended by the several states, is now being transformed into a strong centralized government in which the states may soon become little more than local governmental agencies largely subject to the control of the central government and the central government may be permitted by the courts to exercise broad and sweeping control over the individual actions of citizens in almost every phase of their existence.

It is probable that the destruction of the United States of America as we have known it for nearly two hundred years will not be brought about by nuclear holocaust or by the gradual attrition of the free world by communism (referred to as the salami process—one slice at a time through small wars in Laos, Viet Nam, Berlin, Congo, Cuba, etc.), but by the inertia and the inordinate greed for leisure and security by a "majority" of the people of the United States implemented by action of our judicial, legislative and executive leaders at the federal level and encouraged by the inaction of our leaders at the state level. In my opinion there is no such "majority," but its existence has been assumed by our leaders at the federal level for many years.

The greatest mistake in the United States today, and one which may be fatal to our nation in a time of great peril, is that of confusing communism with the wholly unrelated problem of the extension of governmental power and governmental activities within our "constitutional framework," *i.e.*, socialism and the centralizing of governmental power in Washington at the expense of the states, municipalities and local governmental subdivisions—centralization. It has been one of the basic tactics of the international Communist conspiracy to identify communism with socialism in both its narrow and broad phases and thereby to confuse the peoples who are instituting changes in or determining whether to continue their form of government.

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*Address before the Opening Assembly of the ABA 85th Annual Meeting at California Masonic Memorial Temple, San Francisco, California, August 6, 1962.

The difficulty of dealing with the threat of communism and the threat of socialism is enhanced at the present time by the failure of many loyal, patriotic citizens of the United States to realize that the two are entirely separate and distinct from each other. If our full strength is to be marshalled to meet these problems, these differences must be recognized by the citizens of our country whether such citizens be liberal, moderate or conservative—radical, middle of the road, or reactionary.

One of the greatest leaders of our time, J. Edgar Hoover, a man utterly fearless in everything he says and does to forward the best interests of the United States of America, recently said:

> Knowing what Communism really is and how it operates will . . . help us to avoid the danger of confusing Communism with legitimate dissent on controversial issues. Communism feeds on social ferment. On both the local and national levels, the Communist Party, USA, is continually exploiting social, economic and political grievances for its own tactical purposes. For this reason the "Party Line" will frequently coincide with the views of many non-Communists on specific issues. We must not, therefore, indiscriminately label as Communists those whose opinions on a particular question may, on occasion, parallel the official party position. We must also guard against the tendency to characterize as Communists those who merely disagree with us or who advocate unorthodox or unpopular beliefs.[1]

The confusion and conflict between patriotic American citizens today in the field of "communism," "socialism" and "centralism" is adversely affecting the ability of our country to successfully carry out its duties and obligations as the leader of the free world and to combat the International Communist Conspiracy, the basic purpose of which is the destruction of the United States of America and all free governments of the world.

Whether we wish it or not, whether we recognize it or not, we are engaged in a world-wide struggle for survival. What of the nature of our enemies? We must be clear about this. They have not been reticent in revealing what they are and what they seek:

1. They are dedicated to the understanding that history is to be interpreted as a relentless and unremitting war between the classes which will and must result in the world-wide victory of communism.

2. They believe that the use of force is necessary and inevitable. This force includes murder of individuals, murder of whole segments of populations, "small wars" in any or every part of the world or, if necessary, nuclear holocaust.

3. They are dedicated to the destruction of all morality and every form of religion; in Marx's words: "Atheism is a natural and inseparable part of Marxism."

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[1]Address by J. Edgar Hoover.

4. They are dedicated to the elimination of private property and liberty under the law; dissent and variety—political and otherwise—must be eliminated.

5. They are dedicated to the total control of the society; every phase of social existence is open to unlimited governmental control and civil regimentation.

6. They are, in short, dedicated to world-wide totalitarian dictatorship in all of its manifestations, *i.e.*, that Russia and its satellites and allies will destroy the United States of America and every other free nation in the world and subject them to communistic world-wide domination.

I have gone into this detail because I believe it is necessary in our own minds to understand the true nature of contemporary communism, and to distinguish it in turn from a number of varieties of socialism. It is true, of course, that contemporary communism and socialism have certain common roots, and occasionally bear a superficial resemblance to each other. Both seek, for example, to change the existing structure of capitalism. Communism is totalitarianism and totalitarianism may follow in the wake of socialism. It is this resemblance which Communists have sought to exploit in recent years by identifying their own form of totalitarianism as "true" socialism, just as, for example, they identify their brand of tyranny as "true" democracy. We would be foolish to be taken in by this argument, thus neglecting the essential differences between communism and those contemporary theories of socialism which underlie some of the policies pursued by many of the governments of the free world, including Great Britain, Norway, Sweden and a host of others, and those present governmental practices and policies in the United States which are, in fact, socialistic. Such "Socialists" do not see history in terms of a class struggle or the future in terms of world conquest by Russia, China or any other nation or combination of nations. Their efforts are directed to achieving the traditional Western goal—maximum freedom within national boundaries for each individual to develop as a human being. Although they advocate a greater measure of governmental supervision and control of private business and governmental ownership and operation of industry and business than is consistent with our free enterprise system, they do not seek to bring about these changes by violence; rather they are committed to use of the normally accepted political processes. Socialists are dedicated to a pluralistic rather than monistic society and seek to achieve rather than negate the principles found at the heart of the major ethical and religious systems.

We should also differentiate between socialism and centralism. Centralism consists of an expansion of the power of the central government (frequently referred to as the federal government) at the expense of the states, municipalities and local governmental subdivisions, resulting in the centralization of power in Washington. It does not necessarily in-

volve or include socialism in its broad sense, although the two frequently have parallel connotations and effects. Today I propose to limit my discussion to the growing centralization of power in Washington and, specifically, the extent to which the judiciary has permitted and assisted in this development.

II. Warnings of Centralization

As lawyers we have ignored warning signals of the threats to our federal system posed by centralizing trends. Such warnings are to be found in majority, concurring and dissenting opinions of members of the Supreme Court of the United States. Time after time the Justices of the Supreme Court have called the attention of the legal profession to the changes which have been made, and are being made, the dangers arising from such changes and the possible ultimate results thereof. I have in my library more than one hundred such warnings in the form of extracts from opinions of Justices in recent years. That these changes are gradual does not prevent them from being so fundamental and so far reaching that the government now emerging has little resemblance to that which was set up under the Constitution of the United States as adopted and amended by the several states.

When the Constitution of the United States became a living document, the world was given for the first time a government formed upon the premise that people as individuals are endowed with the rights of life, liberty and property, and with the right of local self-government. The people and their local governments formed a central government and conferred upon it certain stated and limited powers. Theretofore in the history of nations individual rights had been assured and local self-government granted when and to the extent that a sovereign or a central government desired to permit it or when and to the extent that people by force took these rights from the sovereign or from the central government.

Our national government has no reservoir of inherent sovereign powers from which to draw in determining or circumscribing the rights of individuals or in limiting or restricting the powers of the states. Only specific and limited functions, and those reasonably implied therefrom, were conferred upon the officials of the federal government. Among the responsibilities of the Supreme Court is the task of maintaining the federal balance between the central government on the one hand and the states, municipalities and local government subdivisions on the other hand. In recent years this task seems to have been forgotten.

As was said by Thomas Jefferson in 1821: ". . . [T]here is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the Supreme Court."

Jefferson was only half right. He should have added the Congress and the executive leadership of the United States of America utilizing the breaches in the Constitution of the United States fashioned by the courts. The process has not been particularly gradual. Two hundred years is only a moment in the sweep of history.

We are faced with the danger of virtual abolition of the states on the theory that one uniform pattern of government determined by a few men (sometimes judicially by a vote of five to four and sometimes legislatively by a vote of 51 to 49) is the only acceptable pattern for each of the fifty states lying many thousands of miles apart with varied and diverse populations and problems. We are also faced by the danger of civil regimentation of every individual by an all powerful central government in the name of civil rights.

We should never forget the words of the Supreme Court of the United States in *Marbury vs. Madison* through Chief Justice Marshall, when it said:

> . . . [I]t is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?[2]

Until the last quarter century the Supreme Court's decisions in this area were generally in harmony with the true principles of constitutional construction. For 150 years the Court consistently upheld the same position, a position which it restated in 1936, in *Carter v. Carter Coal Co.*, as follows:

> The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court.[3]

I believe that since 1937 the Supreme Court has tended to depart from these long established principles in a number of areas. I question the desirability of this departure, and the greater part of this address will be devoted to exploring the nature of these departures and their potential consequences.

Specifically, I wish to draw your attention to several recent develop-

[2]Marbury v. Madison, 1 U.S. (1 Cranch) 137, 179 (1803).

[3]298 U.S. 238, 291 (1936).

ments in the constitutional doctrine which deserve, perhaps even demand, serious attention upon the part of members of the Bar. The first of these has to do with the expansion of the doctrine of "state action" under the fourteenth and fifteenth amendments to the Constitution so as to include personal actions of individual citizens; the second revolves around the extent to which the limitations and prohibitions of the first eight amendments to the Constitution and the judicially expanded Bill of Rights (usually by a five to four majority of the Court) have been made applicable, in whole or in part, to the states under the aegis of the due process clause of the fourteenth amendment; the third has to do with the increasing federal control over the administration of state criminal proceedings; and the fourth concerns the inordinate weight recently given to the rights of individuals in the fields of national security and law enforcement when they are balanced against the indivisible rights of all who constitute our society. Although separate and distinct in certain respects, these doctrines are clearly linked insofar as they all have an impact upon the federal structure of government in the United States.

Before turning to a detailed discussion of each of these doctrines, however, I would like to say a word about centralizing tendencies generally, and specifically a word about the development of national power under the commerce and general welfare clauses of the Constitution, a development which has attenuated the power of the states, municipalities and local governmental subdivisions, and is assisting the transformation of our federal system into a centralized government. If this trend continues, the states may soon become little more than local governmental agencies, existing as appendages of the central government and largely subject to its control, and the United States of America a monolithic government with broad and sweeping control over the individual actions of citizens. Individuals, as well as the states, may be placed within a straitjacket of federal conformity. These changes have, in large measure, resulted from or been permitted by judicial decisions rendered since the turn of the century.

A. Expansion of the Interstate Commerce Clause

For many decades the Court's interpretation of the power of the central government to regulate interstate commerce had been guided by the understanding that the power was not without limits. As the Court said in the case of *Hammer v. Dagenhart*:

> In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely State authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority dele-

> gated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, *all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.*[4] (Emphasis added.)

The words of the majority here were prophetic, for, in a number of later cases, the Court has approved just such an extension of congressional authority.[5] In certain cases, it has actually sought to offer more power to Congress than the latter has been prepared to accept.[6] Given the propensity, the situation as far as the commerce power is concerned would seem to be summed up accurately in the following comment by Professor Bernard Schwartz of the New York University Law School: "There are really no limitations other than Congressional self-restraint upon the federal commerce power."[7]

B. The Power to Tax and Spend

The Court's approval of the expansion of the commerce clause has been matched by its willingness to approve a similar expansion of the fiscal and regulatory authority of Congress under its power to tax and spend. In *United States v. Butler*,[8] decided in 1936, the Court, after reviewing the extended controversy on the meaning of the clause, set its seal of approval on the Hamiltonian, *i.e.*, the broad, rather than the Madisonian, *i.e.*, the narrow, construction of the power of Congress to tax and spend for the general welfare.[9] In the Court's words:

> While, therefore, the power to tax is not unlimited, its confines

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[4]247 U.S. 251, 276 (1918).

[5]For a detailed discussion of this development, see PRITCHETT, THE AMERICAN CONSTITUTION, Ch. 15 (1959); SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 26-62 (1957); Stern, *The Commerce Power and the National Economy*, 59 HARV. L. REV. 645, 883 (1946); Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446 (1950).

[6]See, *e.g.*, United States v. Southeastern Underwriters Association, 332 U.S. 533 (1944); Kirschbaum v. Walling, 316 U.S. 517 (1942). *Cf.* Justice Frankfurter's comment in Mitchell v. Zachry, 362 U.S. 310 (1960), referring to congressional amendment of Fair Labor Standards Act in 1949: ". . . the change manifests the view of Congress that on occasion courts, including this Court had found activities to be covered, which the law defining body deemed too remote from commerce or too incidental to it."

[7]SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 41 (1957).

[8]297 U.S. 1 (1936).

[9]For a discussion of the issue between the two men, see Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 HARV. L. REV. 548 (1923).

> are set in the clause which confers it, and not in those of Sec. 8 which bestow and define the legislative powers of Congress. It results that the power of Congress to authorize the expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.[10]

A year later, in *Helvering v. Davis*,[11] the Court made it clear that in this field it intended no longer to exercise its functions as the balance wheel of the federal system, when it held that the judgment as to the meaning of the phrase "general welfare" was to be made by Congress and not the courts:

> The line must be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.[12]

In two earlier cases the Court had placed the matter beyond challenge by either individuals or states. In *Massachusetts v. Mellon*,[13] a case involving a state's challenge to the constitutionality of legislation providing for grants-in-aid, the Court said:

> [The] question . . . is political, and not judicial, in character, and therefore is not a matter which admits the exercise of the judicial powers . . . . It follows that insofar as the case depends upon the assertion of a right on the part of the state to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights or persons or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government.[14]

The Court ruled that states could not sue in their own behalf nor, for that matter, could they intervene on behalf of their citizens. In the companion case, *Frothingham v. Mellon*, the Court applied similar limitations to taxpayer suits, arguing that the taxpayer's interest in the treasury was "comparatively minute and indeterminable."[15]

Despite the initial approval which these decisions received, there has been adverse criticism in recent years from both judicial and scholarly sources. In a recent article calling for modification of the doctrine,

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[10]United States v. Butler, 297 U.S. 1, 66 (1936).

[11]301 U.S. 619 (1937).

[12]*Id.* at 640.

[13]262 U.S. 447 (1923).

[14]*Id.* at 483-85.

[15]*Id.* at 487.

Professor Kenneth Davis of the University of Minnesota Law School argued, in part, as follows:

> Although this doctrine is deeply embedded, the combined effect of four rather solid propositions makes it highly vulnerable: (1) Reasons relied upon by the Supreme Court in the *Frothingham* opinion are contrary to the facts about our present tax system; (2) the law of the state courts is overwhelmingly and even almost uniformly opposed to the Supreme Court's doctrine; (3) the fact that the Supreme Court before developing the *Frothingham* doctrine upheld the standing of federal taxpayers shows that nothing in the Constitution compels the denial of such standing; and (4) to the extent that a taxpayer is denied standing to challenge administrative action in making an expenditure which adversely affects the taxpayer in fact, the Administrative Procedure Act is violated.[16]

Given the Court's willingness in *Baker v. Carr*[17] to re-examine a matter formerly judged a "political question" and thus beyond its competence, perhaps we can anticipate a similar willingness in the future to re-examine the *Frothingham* as well as the *Mellon* doctrine. Until then, however, we must live with the fact that the power of the federal Congress to tax and spend is unlimited. The willingness of Congress to exercise the power[18] clearly appears when we compare the federal debt of sixteen billion dollars in 1930 to the present actual and potential federal indebtedness as described by Senator Harry F. Byrd, on page 8951 of the *Congressional Record* of June 2, 1962:

> The U. S. Government in fiscal year 1963, beginning July 1, will have current authority to obligate funds, outstanding federal debt and other commitments of at least $1,242 billion.
>
> This approaches $1\frac{1}{4}$ trillion, but it is far from a complete statement of the Government's actual and potential obligations because untold billions in commitments for future spending cannot be calculated.

III. Departure From Established Principles

A. State Action

Under the two clauses I have just discussed—the commerce clause and the general welfare clause—as now interpreted, the Supreme Court has affirmed the power of Congress to regulate and supervise virtually

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[16]Davis, *Standing to Challenge Governmental Action*, 39 Minn. L. Rev. 353, 387-88 (1955). On this same issue, see Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265 (1961); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255 (1961).

[17]369 U.S. 186 (1962).

[18]On August 20, 1962, the Treasury announced that the debt had exceeded $300 billion. N.Y. Times, August 21, 1962 § 1, P. 30, Col. 1.

any activity that Congress believes to have an effect upon interstate commerce or the "general welfare" of the nation, directly by statute and administrative action or indirectly by the granting (upon conditions) of federal aid or subsidies. It would seem that practically the only area remaining even partially free from regulations or regimentation by the central government is that of purely private relations between citizen and citizen.

Unfortunately, even personal activity is being gradually subjected to federal governmental regulations under authority of recent interpretations of the fourteenth amendment. Allow me to explore this point by examining three of the doctrinal trends to which I referred earlier in this address: The expansion of the concept of state action to include individual action; the partial or total incorporation of the first eight amendments to the Constitution (as they are now being judicially expanded) into the fourteenth amendment; and federal control over state administration of the criminal law. Here the lines of reasoning proposed, and in part adopted, have not yet been carried to their ultimate conclusion. Here particularly the legal profession has the right and duty to make itself heard.

B. Total and Partial Incorporation of the First Eight Amendments

Now I wish to turn to the second of the trends to which I drew your attention earlier in this address: the incorporation, in whole or in part, of the first eight amendments within the purview of the fourteenth amendment.

During the past twenty-six years, the Supreme Court has made deep inroads into the area of action assigned to the states under the provisions of the Constitution as originally adopted and subsequently amended. This has been accomplished through a construction of the fourteenth amendment which seeks to embrace, as limitations upon state action, many of the guarantees which the first eight amendments gave to the people exclusively against their newly created national government.

The first section of the fourteenth amendment reads, in part, as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Barron v. Baltimore*,[19] decided in 1833, Chief Justice John Marshall, speaking for a unanimous court, had ruled that the first eight

[19]10 U.S. (7 Pet.) 243 (1833).

amendments were not applicable to the states. The issue was raised again after the adoption of the fourteenth amendment. The answer was the same. Freedom of religion and of speech in the first amendment,[20] immunity from unreasonable search and seizure in the fourth amendment,[21] the right of indictment by grand jury and the guarantees against double jeopardy and self-incrimination in the fifth amendment,[22] the right of jury trial conferred by the sixth and seventh amendments,[23] as well as the other guarantees of the first eight amendments, were consistently construed after the adoption of the fourteenth amendment as containing "no restrictions on the powers of the state" but as "intended to operate solely on the federal government.[24] In 1899 the Court, with one dissent, held that the privileges and immunities of citizens of the United States, of which the fourteenth amendment speaks, do not necessarily include the rights of the individual protected against the national government by the first eight amendments.[25]

As late as 1922, Mr. Justice Pitney, speaking for the majority in *Prudential Ins. Co. v. Cheek*,[26] reiterated the fundamental position in the following words:

> . . . [B]ut as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about "freedom of speech" or the "liberty of silence," nor, we may add, does it confer any right of privacy upon either persons or corporations.[27]

Three short years later the Court began to change its mind. In 1925, the Court indicated, by way of dictum in *Gitlow v. New York*,[28] that at least the prohibitions of the first amendment were made applicable to the states by the fourteenth. In the Court's words:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States.[29]

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[20]Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922).

[21]Weeks v. United States, 232 U.S. 383 (1914).

[22]United States v. Lanza, 260 U.S. 377 (1922); Twining v. New Jersey, 211 U.S. 78 (1908).

[23]Palko v. Connecticut, 302 U.S. 319 (1937); Walker v. Sauvinet, 92 U.S. 90 (1875).

[24]Brown v. New Jersey, 175 U.S. 172, 174 (1899). For a general discussion of this issue, see Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

[25]*Ibid.*

[26]259 U.S. 530 (1922).

[27]*Id.* at 543.

[28]268 U.S. 652 (1925).

[29]*Id.* at 666.

The gates were apparently open; the question was, how far? Some argued they were completely open, and sought in turn a wholesale incorporation of the first eight amendments into the fourteenth. This effort failed. In *Adamson v. California,* the Supreme Court, by a vote of five to four, rejected the proposition.[30] It has continued to do so in later cases.

The proponents of incorporation, rebuffed in the matter of total incorporation, have been much more successful in bringing about what might be called a selective incorporation. In addition to the first amendment freedoms, this Court has found indispensable to what it considers a "scheme of ordered liberty"—to use the term first adopted by Justice Cardozo in *Palko v. Connecticut,*[31] the sixth amendment's requirement that a defendant be assisted by counsel in capital cases,[32] and the fourth amendment's guarantee against unreasonable searches and seizures.[33]

On June 19, 1961, the last day of the 1960 term of the Supreme Court, a complete departure from the recognized meaning of the amendment was brought about. In *Mapp v. Ohio*[34] five justices of the United States Supreme Court combined to overrule the 1949 decision of *Wolf v. Colorado.*[35] Henceforth, state courts must exclude evidence obtained in violation of the search and seizure provisions of the fourth amendment, as interpreted by the courts. This exclusionary rule, first adopted in *Weeks v. United States*[36] as a judicially created rule of evidence to guide federal courts, has now been extended to the states under the aegis of the fourteenth amendment. Interestingly enough, this action was taken without either party's having asked for such a decision; the question had not been briefed by counsel nor argued before the Court. As Mr. Justice Harlan emphasized in a strong dissent, "five members of this Court . . . simply 'reached out' to overrule *Wolf,*" and he continued:

> I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights. But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.[37]

Traditionally, the administration of the criminal law has been one

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[30]332 U.S. 46 (1947).
[31]302 U.S. 319 (1937).
[32]Powell v. Alabama, 287 U.S. 45 (1932).
[33]Mapp v. Ohio, 367 U.S. 649 (1961).
[34]*Ibid.*
[35]338 U.S. 25 (1949).
[36]232 U.S. 383 (1914).
[37]Mapp v. Ohio, 367 U.S. 643, 686 (1961) (dissent).

of the areas reserved primarily to the states. In a recent article,[38] Mr. Justice Brennan emphasized that a conscious regard for our federalism is, and ought to be, one of the components of a judgment whether the Court should incorporate one of the provisions of the Bill of Rights within the terms of the fourteenth amendment. In his words: "The considerations of federalism of course loom large. A decision rejecting absorption of a particular guarantee will usually be made to rest on the inconsistency of its absorption with 'the full power of the State to order its own affairs and govern its own people.' "[39] The majority's action in the *Mapp* decision reflects little concern for the problem of the distribution of power between the federal government and the several states.

C. The Procedural Techniques of Federal Control of State Criminal Proceedings

State control of the administration of criminal law is currently being threatened by an ever-expanding system of federal control, and state criminal law is fast becoming a mere appendage of federal constitutional law. If the trend is not soon halted, the subject may pass entirely from state control to federal domination.

The present danger is that all crimes will become federal crimes, all police federal police, and all the institutions of punishment and rehabilitation federal institutions. In short, the entire machinery for the administration of the criminal law will be concentrated in the hands of an overpowering federal government. This is precisely the danger the federal constitution was designed to prevent by a means of a system of checks and balances and a division of both responsibilities and power between federal and state governments.

The nation is now faced with the culmination and coalescence of several separate doctrines that have been developing for about a century and a half. Singly, at least in their origins, none seemed to pose any serious threat. But collectively, particularly as a result of burgeoning growth in a favorable federal judicial climate, these developments pose an almost overwhelming threat to the states.

There are four principal procedural techniques presently available for the complete suppression by the federal government of continued state control of the administration of criminal justice. Three of these techniques are judicial and one is legislative and executive. The three judicial techniques are as follows: (1) The United States Supreme Court, by direct appellate review, re-examines state criminal trial proceedings within a scope which is expanding from month to month; (2) the federal judiciary, initially at the district court level, through the mechanism

[38]Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. Rev. 761 (1961).
[39]*Id.* at 770.

of federal habeas corpus, indirectly review and re-try state criminal cases after they have been determined by the highest appellate court of the state; (3) in trials in the federal courts under the Civil Rights Act, state officials charged with responsibility for administration of the criminal law are required to give an accounting of their stewardship to federal judges and may be sued by defendants in federal courts, even though ample remedies are available in state courts.

The legislative and executive technique involves an ever-expanding federal criminal jurisprudence, through the creation of new federal crimes, enforced by federal police, prosecuted by federal prosecutors, adjudicated by federal judges, and punished in federal institutions. This expansion is based primarily on the power of Congress to regulate interstate commerce, a power which, through fictions and specious reasoning, has been carried into areas entirely foreign to its original purpose. It is abetted by forced and specious constructions of the "due process" and "equal protection" clauses of the fourteenth amendment.

Each of these four procedural techniques of federal control will be examined briefly to show its origin and how, in the beginning, each was very limited in scope and entirely unrelated to the other techniques of control. The four separate techniques have grown, cross-fertilizing each other, so that they now have reached a state of development where they are coalescing into a single multi-pronged threat to state criminal law.

1. *Direct Appellate Review by the Supreme Court*

The first of the judicial techniques, the power to review state judgments, stems from section 25 of the Judiciary Act of 1789[41] and its successor sections in the present Judicial Code of 1948.[42] In *Murdock v. City of Memphis*,[43] the Court refused to extend post-war legislation amending the judicial code so as to confer upon the Supreme Court power to review state or general questions of law, thus confining its jurisdiction to review of federal questions. This restriction has become less significant through time in view of the expansive interpretation of the due process and equal protection clauses of the fourteenth amendment adopted by the Court.

It is impossible in the short time we have here to follow, step by step, the way in which more and more questions have been opened up to direct review by the court. It is worth noting, however, the present reach of the doctrine. In a recent case, *Thompson v. City of Louisville*,[44] the Court reviewed judgment of conviction to determine whether it was

[40] 367 U.S. 649 (1961).
[41] 1 Stat. 85 (1789).
[42] 28 U.S.C. § 1257 (1958).
[43] 87 U.S. (20 Wall.) 590 (1874).
[44] 362 U.S. 199 (1960).

so "totally devoid of evidentiary support"[45] as to render it unconstitutional under the due process clause of the fourteenth amendment. While the Court sought, in using this phrasing, to limit the holding, saying "decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all,"[46] the lower federal courts have taken the position that the decision in fact opens new areas within which federal courts may set aside state convictions. The lower federal courts are now holding that the *Thompson* rule directs them to examine the evidence on which state convictions are based to determine whether evidence in support of some "essential element of the alleged crime"[47] is missing, which is only another way of saying that the evidence does not support the conviction.

2. *Indirect Federal Review through Habeas Corpus*

At first, federal habeas corpus was not available under the Judiciary Act of 1789 to those detained by state authorities.[48] In the third and fourth decades of the 19th century, it became available in exceptional circumstances to those so detained;[49] but it was not until 1867 that the protection became available generally to those claiming that their detention was "in contravention of the Constitution or laws of the United States."[50] It is not my purpose to trace the history of the developments since 1867. It is sufficient to note that in recent years, as a concomitant of the expansion of the due process and equal protection clauses, it has become increasingly the resort of state prisoners seeking to upset state convictions. The congressional attempt in 1948 to limit this practice was severely limited in its effect by the Supreme Court decision in *Brown v. Allen*.[51] No additional legislation dealing with this problem has issued from Congress since that time.

3. *Suits Against State and Local Government Officials*

The way was opened in *Monroe v. Pape*,[52] decided in 1961, for prosecution in the federal courts of ordinary legal proceedings against state and local governmental officials, even though there is an adequate remedy in the state court. This was done under an attenuated interpretation of one section of the Civil Rights Act of 1871. The action was

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[45] *Id.* at 199.

[46] *Ibid.*

[47] Torrance v. Salzinger, 297 F.2d 902 (1962); see Note, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 STAN. L. REV. 328 (1962).

[48] 1 Stat. 81-82 (1789).

[49] 4 Stat. 634 (1833); 5 Stat. 539 (1842).

[50] 14 Stat. 385 (1867).

[51] 344 U.S. 443 (1953).

[52] 365 U.S. 167 (1961).

brought in the federal court to obtain damages on account of illegal activities by Chicago police officers. The majority, conceding that a remedy existed under Illinois law, nonetheless held:

> It is no answer that the State has a law which if enforced would give relief. The Federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the Federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the Federal Court.[53]

Mr. Justice Frankfurther, in a vigorous dissent, pointed out that the decision was of "far reaching significance for our federal system."[54] He reviewed the cases which hold that the fourteenth amendment is violated if acts of state officers constitute patent violations of state law, and then pointed out that if there was no question that Congress, in the Civil Rights Act of 1871, could have embraced such conduct within the purview of its enactment. The question for him was whether it had done so. He did not feel that it had, and, though he was conscious of the merits of the argument, he questioned that it should be dealt with by a strained interpretation of the law. In his words:

> In concluding that police intrusion in violation of state law is not a wrong remediable under R. S. sec. 1979, the pressures which urge an opposite result are duly felt. The difficulties which confront private citizens who seek to vindicate in traditional common-law actions their state-created rights against lawless invasion of their privacy by local policemen are obvious, and obvious is the need for more effective mode of redress. The answer to these urgings must be regard for our federal system which presupposes a wide range of regional autonomy in the kinds of protection local residents receive. If various common law concepts make it possible for a policeman—but no more possible for a policeman than for any individual hoodlum intruder—to escape without liability when he has vandalized a home, that is an evil. But, surely, its remedy devolves in the first instance, on the States. Of course, if the States afford less protection against the police, as police, than against the hoodlum—if under authority of state "statute, ordinance, regulation, custom or usage" the police are specially shielded—sec. 1979 provides a remedy which dismissal of petitioners' complaint in the present case does not impair. Otherwise, the protection of the people from local delinquencies and shortcomings depends, as in general it must, upon the active consciences of state executives, legislators and judges. Federal intervention, which must at best be limited to securing those minimal guarantees afforded by the enveloping concepts of due process and equal protection, may in the long run do the individual a disservice by deflecting responsibility from the state lawmakers,

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[53] *Id.* at 183.

[54] *Id.* at 202.

> who hold the power of providing a far more comprehensive scope of protection. Local society, also, may well be the loser, by relaxing its sense of responsibility and, indeed, perhaps resenting what may appear to it to be outside interference where local authority is ample and more appropriate to supply needed remedies.[55]

4. *Legislative and Executive Control over State Criminal Proceedings*

The federal government has exercised various techniques of legislative and executive control of state criminal proceedings mainly by invoking the power of Congress to regulate interstate commerce.

The Fugitive Felon Act is an example.[56] This act was first adopted in 1934 and created a new crime against the federal government, committed when a person moves in interstate commerce with the intent to avoid prosecution by a state for certain enumerated crimes or to avoid giving testimony in any criminal proceedings. In 1961 the act was amended so as to cover any crime which is "punishable by death or which is a felony under the laws of the place from which the fugitive flees."[57] The act is used by the federal government to apprehend persons accused of crime and return them to the state where they are wanted; having accomplished this, the federal prosecution is customarily dismissed. During the past ten years, federal prosecutions have been undertaken in less than fifty instances in a total of more than 10,000 apprehensions under the act. The point is that 10,000 federal prosecutions could have been undertaken.

There is much to be said in favor of the act and its administration to date as a means of dealing with those who seek to thwart justice by fleeing from the state in which they are accused of crime. At the same time, we should not ignore the potential dangers present in the act. It places great powers in the hands of the federal government and those who are charged with its administration, and such powers can be abused. It supplies an additional lever which could, in the future, be used to bring about the supersession of state administration of criminal justice. The doctrinal basis for such a development has been established. Only the catalyst of a single Supreme Court decision is still needed.

This decision would involve the extension to the states of the double jeopardy provision of the fifth amendment. This could be brought about either by extending the whole Bill of Rights to the states, as has been urged by some of the justices, or by selectively incorporating this particular provision, as has generally been the case in regard to other provisions of the Bill of Rights held to apply to the states. The clause, so applied, would bar more than one prosecution for crimes based on the

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[55] *Id.* at 242-43.

[56] 18 U.S.C. § 1073 (1958).

[57] 18 U.S.C. § 1073 (Supp. 1963).

same transaction. The kidnapping of a person in one state and carrying him into another state, for example, would be held to be a single crime, growing out of a single transaction, and not, as now held, three crimes, one against each state and one against the federal government for transporting of the kidnapped person across state lines.

Then, by use of the doctrine of pre-emption, it would be found that Congress has pre-empted the administration of criminal justice. The pattern of pre-emption of state criminal law has already been blueprinted in *Pennsylvania v. Nelson*.[58] The *Nelson* case involved the prosecution by Pennsylvania of an acknowledged member of the Communist Party for sedition. The Supreme Court denied the power of Pennsylvania to do so, holding that the Federal Smith Act had superseded state laws on sedition. Congress had pre-empted the field.

The creation of a federal constitutional right against double jeopardy combined with the doctrine of pre-emption of the *Nelson* case would provide the doctrinal basis for the transfer of the administration of the great body of criminal law from the states to the federal government. It would be said that article VI of the federal constitution, which provides that "the laws of the United States" made in pursuance of the Constitution "shall be the supreme law of the land," requires that result. Also, under existing lines of constitutional construction, congressional expansion of crimes involving interstate commerce could be almost limitless.

I do not mean to assert, of course, that these things will happen; what I wish to do is to suggest that it is possible, if present trends continue, that they may happen.

D. Balancing the Public Interest Against Private Interest

It is with complete respect for the Supreme Court and its members that I now turn to a subject of extreme importance. The vexing problem of achieving a rational balance between the individual liberties guaranteed by the Constitution and the indivisible liberties and security of society itself has attained proportions that accord it the highest priority in the law.

The exaltation and expansion of individual liberties at the expense of the equally valid indivisible liberties of all citizens who collectively constitute our society became noticeable some twenty years ago. As Judge Learned Hand pointed out:

> Even before Justice Stone became Chief Justice it began to seem as though, when "personal rights" were an issue, something strangely akin to the discredited attitude towards the Bill of Rights of the old apostles of the institution of property, was

[58] 350 U.S. 497 (1956).

> gaining recognition. Just why property itself was not a "personal right" nobody took the time to explain . . . .[59]

And in the words of Professor Paul Freund, writing in 1950: "The Court as a whole has given sanctuary to civil liberties that were not indicated even by the Courts on which sat Holmes, Hughes, Brandeis, and Cardozo."[60]

The extent to which some of the justices are prepared to carry this development has been suggested by Justice Black in the second *Konigsberg*[61] case, when, speaking for himself and three other justices in dissent, he suggested that the first amendment is "absolute" and must be enforced "according to its terms."[62] He criticized the use by the Court of tests which involved the balancing of interests, saying that the use of the latter "undermines the very foundation upon which the First Amendment, the Bill of Rights, and indeed, our entire structure of government rests."[63]

Fortunately, this view is not subscribed to by the majority of the Court. Mr. Justice Frankfurter, in a concurring opinion in the *Kovacs*[64] case, expressed the position of the other sector of the Court when he said:

> Wise accommodation between liberty and order always has been, and ever will be indispensable for a democratic society. Insofar as the Constitution commits the duty of making this accommodation to this Court, it demands vigilant judicial self-restraint. A single decision by a closely divided court, unsupported by the confirmation of time, cannot check the living process of striking a wise balance between liberty and order as new cases come here for adjudication . . . .[65]

It should be noted that this new emphasis upon the constitutional liberties of the individual is coming to permeate the entire field of administration of criminal justice. The effects of decisions in this area have been noted by members of the Court. Let me cite several recent examples. In *Roviaro v. United States*,[66] the dissenting opinion said, "The disclosure required here today is not only unessential to the petitioners' defense but on the other hand undermines a long standing policy necessary to . . . successful enforcement of the narcotic laws . . .";[67] in *Lambert v. California*,[68] the dissenting opinion said, "If the generalization that underlies and alone can justify this decision were to be

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[59] HAND, THE SPIRIT OF LIBERTY 205-06 (1954).

[60] FREUND, ON UNDERSTANDING THE SUPREME COURT 9 (1950).

[61] Konigsberg v. State Bar of California, 336 U.S. 36 (1961).

[62] *Id.* at 64.

[63] *Id.* at 67.

[64] Kovacs v. Cooper, 336 U.S. 77 (1949).

[65] *Id.* at 89.

[66] 353 U.S. 53 (1957).

[67] *Id.* at 71.

[68] 355 U.S. 225 (1957).

given its relevant scope a whole volume of the United States Reports would be required to document in detail the legislation in this country that would fall or be impaired";[69] in *Miller v. United States,*[70] the dissenting opinion said, "This Court now superimposes upon the local rule of the District an artificial and unrealistic requirement . . .";[71] in *Giordenello v. United States,*[72] the dissenting opinion said, "It is unfortunate that through this by-play the constitutional limitations surrounding search and seizure are extended to the long-recognized powers of arrest . . . . Such purblindness may set the petitioner free but it shackles law enforcement";[73] and in *Arroyo v. United States,*[74] the dissenting opinion said, "Unfortunately, the Court has converted the 'substantial danger' into an immunity bath . . . it is clear that the injection of this subtle and elusive mental element of duplicity is enough to make a successful prosecution next to impossible."[75] These are only a few of the examples that might be introduced in this connection.

While we recognize that America must have a system of criminal justice that accords to individuals the fullest reasonable protection under the terms of the Constitution, we cannot, at the same time, afford to overlook the rights of society. As one of our state governors recently said, "The rights of the individual, however important, must fit within the framework of a workable system of criminal justice . . . a system that adheres basically to a 'rule of law,' which is susceptible to being reasonably understood, and which reasonable administrators can make work." There is reason to believe that some of the justices in recent years have neglected the requirements of the ordered liberty of society as a whole in their search for maximum individual freedom.

IV. Conclusion

The Court, several decades ago, was accused of exercising legislative functions and placing itself in the role of a super-legislature. The present Court, while it has also been accused of invading the legislative province, has ranged widely in various fields normally within the jurisdiction of the several states. Indeed, individual justices have criticized the Court for constituting itself as a super-administrative board in many fields.[76] The assumption of these functions reflects, to my mind, a basic want of confidence in the continued validity of our federal system. The demise of this system has already been celebrated by a num-

[69] *Id.* at 232.
[70] 357 U.S. 301 (1958).
[71] *Id.* at 315.
[72] 357 U.S. 480 (1958).
[73] *Id.* at 491-92.
[74] 359 U.S. 419 (1959).
[75] *Id.* at 433.
[76] See White, The States and the Nation 1 (1953).

ber of authorities, but in this matter I prefer to align myself with the conference of Chief Justices which in a report adopted in 1958 said:

> We believe that strong state and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that in the interest of active, citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened . . . .
>
> We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy. We further believe that in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of state action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

This position has recently received high level support in both the legislative and executive branches of government. In *The Conscience of a Conservative* at pages 22-23, Senator Barry Goldwater said:

> Our tendency to concentrate power in the hands of a few men deeply concerns me. We can be conquered by bombs or by subversion; but we can also be conquered by neglect—by ignoring the Constitution and disregarding the principles of limited government. Our defenses against the accumulation of unlimited power in Washington are in poorer shape, I fear, than our defenses against the aggressive designs of Moscow. Like so many other nations before us, we may succumb through internal weakness rather than fall before a foreign foe.
>
> I am convinced that most Americans now want to reverse the trend. I think that concern for our vanishing freedoms is genuine. I think that the people's uneasiness in the stifling omnipresence of government has turned into something approaching alarm. But bemoaning the evil will not drive it back, and accusing fingers will not shrink government.
>
> The turn will come when we entrust the conduct of our affairs to men who understand that their first duty as public officials is to divest themselves of the power they have been given.

This also has been supported by Governor Nelson Rockefeller, the executive head of the most populous state in the union, who stated in a recent address:

> I refer to the federal idea broadly as a concept of government by which a sovereign people, for their greater progress and protection, yield a portion of their sovereignty to a political system that has more than one center of sovereign power, energy and creativity . . . . The federal idea is, . . . above all an idea of a shared sovereignty at all times responsive to the needs and will of the people in whom sovereignty ultimately resides . . . .
>
> The federal idea fosters diversity within unity . . . . The federal idea permits and encourages creativity, imagination, and innovation in meeting the needs of the people. Those needs, if not met by private action, can be met at the local, the state, or the national level of government. By providing several sources of political strength and creativity, a federal system invites inventive leadership—on all levels—and to work toward genuine solutions to the problems of a diverse and complex society.[77]

The problems I have discussed today deserve and require maximum and sustained attention at every level. There are those who assert, of course, that the people are getting just what they want as a result of this continued centralization of power, that security rather than liberty is their goal, and that they will find this security in the arms of an all-powerful and all-encompassing central government. I do not believe that is the case. I believe the central problem lies in the absence of a public understanding of what is, in fact, happening to our country, our central government, our states, our municipalities and our citizens. We must dispel the apathy and lack of knowledge which exist today. Certainly it behooves us to make the attempt for, as George Washington once said: "Government is not reason, it is not eloquence—it is force! Like fire, it is a dangerous servant and a fearful master."

[77]Address by Governor Nelson Rockefeller of New York.

CIVIL REGIMENTATION IN THE NAME OF CIVIL RIGHTS*

I. Introduction

The heritage of liberty under the law which we enjoy as citizens of the United States of America finds its foundation in the civil liberties assured to us by the Bill of Rights of the Constitution of the United States. In approaching this subject I do so in the words of Judge Learned Hand, appearing at page 31 of the Oliver Wendell Holmes Lectures delivered by him in 1958, entitled "The Bill of Rights":

> My topic being the "Bill of Rights," by which, as I have said, I mean the first eight and the fourteenth amendments, I am not concerned with those decisions that have marked the division between the powers of the nation and of the state, *for the "Bill of Rights" is concerned only with the protection of the individual against the impact of federal or state law.*[1] (Emphasis added.)

In the hysteria of the two great political parties striving to obtain the support of well organized and powerful pressure groups, there have been dropped from Judge Learned Hand's definition the words "federal or." In fact, the entire trend and impact of the civil rights hysteria has been to destroy the civil liberties of individual citizens upon the excuse that civil regimentation by federal personnel is a protection of "civil rights" against state interference.

Unfortunately the cloak of fair and non-discriminatory treatment of minority groups has been used as a spring-board for proposed and, in some instances, accomplished extension of federal power at the expense of the states and the destruction of individual liberties.

Dean Roscoe Pound, Dean Emeritus of Harvard University School of Law, one of the most eminent living authorities on the letter and philosophy of the law, defines the Bill of Rights as limitations upon all government:

> Analytically the bills of rights are bills of liberties. *They define circumstances and situations and occasions in which politically organized society will keep its hands off and permit free, spontaneous, individual activity; they guarantee that the agents and agencies of politically organized society will not do certain things and will not do certain other things otherwise than in certain ways.*[2] (Emphasis added.)

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*An address delivered by John C. Satterfield at the Annual Forum on Civil Rights of the Toledo Bar Association and the School of Law of the University of Toledo, January 10, 1963, and to Rutgers Law School Annual Symposium Series, "Civil Liberties and States Rights-Federal Relationship," March 11, 1963.

[1] Hand, Oliver Wendell Holmes Lectures 31 (1958).

[2] Pound, The Development of Constitutional Guarantees of Liberty 92 (1957).

Certainly the federal government is one phase of "politically organized society."

Another limitation of civil rights has been completely forgotten in these days of stress. Rather than state this limitation myself, I turn to the statement of Robert E. Cushman, Goldwin Smith Professor of Government of Cornell University, who stated in *Civil Liberties in the United States,* prepared for the use of "the directors and officers of The Fund for the Republic": "First Amednment rights are, of course, not absolute and were never intended to be so. *They are relative, in the sense that they are limited by the co-existing rights of others* (as in the matter of libel) *and by the demands of national security and public decency.*"[3] (Emphasis added.)

This principle, stated in its application to the first amendment, is also applicable generally to the provisions of the entire Bill of Rights. It seems to have been forgotten that the "civil rights" of one individual or of a class of individuals, when enforced by governmental authority, usually restrict and limit the coexisting rights of others. *One freedom is destroyed to enforce another freedom by governmental action.* The governmental restraint of one individual at the behest of another is the restriction of the civil liberties and the destruction of civil rights of one at the behest and for the benefit of the other.

We must remember that the fourteenth amendment does not and was never intended to restrict or circumscribe the actions of individuals. It is directed to state rather than individual or private action. First fully announced in the *Civil Rights Cases,*[4] decided in 1883, this important distinction has been several times re-emphasized by the present Court, most recently in *Burton v. Wilmington Parking Authority,*[5] when the Court said:

> The Civil Rights Cases . . . "embedded in our constitutional law" the principle "that the action inhibited by the first section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." . . . It is clear, as it always has been since the Civil Rights Cases . . . that "Individual invasion of individual rights is not the subject-matter of the Amendment," . . . and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it.[6]

In describing the federal legislation permitted by the fourteenth amendment, the Supreme Court said in the *Civil Rights Cases:*

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[6] *Id.* at 721-22.

[3] CUSHMAN, CIVIL LIBERTIES IN THE UNITED STATES 2.

[4] 109 U.S. 3 (1883).

[5] 365 U.S. 715 (1961).

> Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. *It would be to make Congress take the place of the State Legislatures and to supersede them.* It is absurd to affirm that, because the rights of life, liberty and property, which include all civil rights that men have, are, by the Amendment, sought to be protected against invasion on the part of the State without due process of law, Congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the Amendment, therefore Congress may establish laws for their equal protection.[7] (Emphasis added.)

It is a strange spectacle today to see those who would destroy civil liberties by federal regimentation of individuals and federal domination of state and local officers and judges base their claims to the right to accomplish such destruction upon a plea of "civil rights."

To put the problem in the proper perspective, we must remember the protection provided by the Constitution of the United States against usurpation of power by one branch of the federal government as against another. Just as important is the protection against usurpation of power by the central government as against the states. The separation of powers as a basic constitutional protection of liberties was recognized by Dean Pound as follows:

> Along with bills of rights, the separation of powers—the putting of legislative, executive, and judicial functions in distinct departments by a fundamental law, *binding each and requiring each to keep within its legal bounds*—is specially characteristic of our first constitutions and of American constitutions ever since.[8] (Emphasis added.)

The founding fathers realized that a division of power and authority into departments of a central government was not sufficient. If our government were to be preserved for future generations, the powers of the central government must be limited and circumscribed by powers retained by the people and conferred by them upon their state and local governments. In 1958 the Conference of Chief Justices (composed of the Chief Justices of all of the states) recognized that this principle is as important today as when our nation was formed, in the following statement adopted in 1958:

> We believe that strong state and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to

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[7]The Civil Rights Cases, 109 U.S. 3, 13 (1883).

[8]POUND, *op. cit. supra* note 3, 492.

> leveling, and sometimes deadening, uniformity; and that in the interest of active, citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened. . . .
>
> We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy. We further believe that in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of state action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

The Report of the United States Commission on Civil Rights, to which I will now direct your attention, should be read in the light of the principle of constitutional law repeatedly announced by the Supreme Court of the United States, illustrated by the case of *Kansas v. Colorado,* as follows:

> But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.[9]

All references to report of the Commission are to the supplemental volume published by it entitled "Civil Rights—Excerpts from the 1961 United States Commission on Civil Rights Report."

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[9]206 U.S. 46, 89-90 (1907).

II. A Blueprint for Autocracy

On one of the great public buildings in Washington appears the inscription, "We are ringing the bells of the future with the ropes of the past." In government it may well be said that "We are charting the course of the future with the reports of the present." In order to get a picture of the relationship of "civil rights" to states rights and to individual liberties, I have reviewed in detail the five-volume 1961 Report of the United States Commission on Civil Rights. This Report is startling to the casual reader, alarming to the careful student, and frightening to those of us who believe in the maintenance of the system of government created by the Constitution of the United States. This Report would create a limitless central government restricting the freedom and destroying the liberties of individuals and controlling the essential functions of the state and local governments.

If the recommendations set forth in this Report should be adopted, the following would result:

1. The administration of justice by all local and state law enforcement officers and courts would be usurped, supervised and regulated by the federal government. Federal control would extend from the first telephone call by a citizen asking police protection through the arrest, arraignment, indictment, trial, sentence and imprisonment of the criminal. Civil and criminal penalties would be held over the heads of every state and local law enforcement officer in the United States.

2. The federal government would take over from state and local authorities all steps in the election of local, state and federal officials, including all voter qualifications, the registration of voters, the counting of votes, the establishment of voting districts for state and federal elections, the establishment of electoral districts for the election of state and federal legislators, with civil and criminal penalties for any action or *inaction* which federal personnel claim to be arbitrary.

3. A federal agency would be created to supervise the administration of all grammar schools, high schools and colleges in the United States supported by local and state funds (four members of the Commission wish to extend this to private educational institutions); every local board of school trustees in the United States could be required to file periodic reports with the agency; conformity to the desires of federal personnel would be forced by civil and criminal penalties; federal employees would be sent into the local school districts as "social workers" and "technical workers"; federal bodyguards would be provided "to protect the school board members . . . supervisory officials and teachers . . . from bodily harm, harrassment, intimidations and/or reprisals by officials or private persons" (it is not specified whether these bodyguards would be federal marshals or federal troops). Although the present recommendation is limited to the field of race, the ultimate result is

stated in the negative on page 48 of Volume 6: ". . . in any such federal action taken, it should be stipulated that no federal agency or official *shall be given power to direct, supervise or control the administration, curricula or personnel of an institution operated or maintained by a state or political subdivision thereof.*"[10] The fact that the Commission's recommendations concerning voting and enforcement of state criminal laws are not limited to matters of race foreshadows similar unlimited recommendations in the educational field. Once the pattern is set, the negative will become affirmative, the exception will become the rule and federal personnel will direct, supervise and control the administration, curricula and personnel of all grammar schools, high schools and colleges in the United States.

4. In the field of business and industry the Commission recommends that the federal government take over the relationship of employer and employee to be manipulated, controlled and regimented in accordance with the desires of federal personnel through the establishment of a federal agency to police and control (with civil and criminal penalties available) all employment created or supported by government contracts or federal aid funds, all federally assisted training programs, activities of all labor organizations, all state agencies receiving any federal assistance. The present recommendations are limited to the field of race.

5. Finally, there has been recommended by the Commission and already tentatively effectuated by Executive Order 11063 issued on November 20, 1962, a federal takeover of homes and homebuilding whereby the all-pervading hand of federal personnel (having available civil and criminal remedies to bring about their desires) is about to grasp by the throat home-owners, realtors, building and loan associations, banks, financial institutions engaged in the mortgage loan business, local public housing authorities, contractors, developers, and the governing authorities of municipalities. How tight the squeeze will be is to be determined by federal personnel. This federal action will invade all phases of home ownership including, in the words of the order, "the sale, leasing, rental or other disposition of residential property and related facilities (including land to be developed for residential use) *and the occupancy thereof.*" The present recommendations are limited to the field of race. Federal personnel will be looking over the shoulder of every citizen when he buys land to be developed for residential use, buys or builds a home, rents a room in his home, or sells his home.

All of this is in the name of Civil Rights. All of this will result in the wholesale destruction of civil liberties. Now that the federal government is using its financial power to bring about political and sociological

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[10] 6 U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS—EXCERPTS FROM THE 1961 REPORT 48 (1961) [hereinafter cited as CIVIL RIGHTS].

ends consonant with the desires of the political party in power, there is no reason to believe that the exercise of this power will end with matters of race. The foot is in the door. The shadow of the past and present is thrown upon the future. The end is not yet.

III. "A Man's Home Is His Castle"

Tens of millions of Americans have financed their homes through lending institutions and/or through loans to which the federal government has given financial support in varying degrees. The Commission states:

> The Federal Government has been without question the major force in the expansion of the housing and home finance industries. . . . The present study emphasizes the extensive nature of the Federal contribution. The private housing and home finance industries, through which governmental housing assistance largely reaches the American people, rely heavily on that contribution. . . . At the end of 1960 the Nation's nonfarm home mortgage debt stood at $160 billion. More than 60 percent of this amount *($100 billion)* is held by financial institutions that are benefitted in varying degrees by the Federal Government and closely supervised by one or more of four Federal regulatory agencies—the Federal Home Loan Bank Board, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation. *National banks* (regulated by the Comptroller of the Currency) and *Federal savings and loan associations* (regulated by the Federal Home Loan Bank Board) operate under Federal charters and are subject to the *exclusive control of the Federal Government.*[11] (Emphasis added.)

The Report points out that these institutions have assets in excess of $890 billion. Heretofore conditions attached to such financing have been largely upon a reasonable business basis. The tremendous power thus placed in the hands of federal personnel should not be perverted to bring about political and sociological ends desired by the political party then in power. Yet, this is the very end sought by the Commission on Civil Rights and by Executive Order 11,063[12] issued on November 20, 1962, as a result of the Commission's recommendations.

What will happen to home owners, realtors, building and loan associations, contractors, banks, municipalities, professional persons, and others in this field is foreshadowed by the recommendations of the Commission and the provisions of the Executive Order, which include a directive that federal personnel (through the "departments and agencies in the executive branch of the Federal Government") "take all action

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[11] *Id.* at 63-64.

[12] Exec. Order No. 11,063, 27 Fed. Reg. 11525 (1962).

necessary and appropriate" to enforce the dictates of the federal government concerning race (Part 1 of Executive Order 11,063):

> (a) in the *sale, leasing, rental, or other disposition of residential property and related facilities* (including land to be developed for residential use), or occupancy thereof, if such property and related facilities are—
>
> (i) owned or operated by the Federal Government, or
>
> (ii) provided in whole or in part with the aid of loans, advances, grants, or contributions hereafter agreed to be made by the Federal Government, or
>
> (iii) *provided in whole or in part by loans hereafter insured, guaranteed, or otherwise secured by the credit of the Federal Government,* or
>
> (iv) provided by the development or the redevelopment of real property purchased, leased, or otherwise obtained from a State or local public agency receiving Federal financial assistance for slum clearance or urban renewal with respect to such real property under a loan or grant contract hereafter entered into; and
>
> (b) in the lending practices with respect to residential property and related facilities (including land to be developed for residential use) of lending institutions, insofar as such practices relate to loans hereafter insured or guaranteed by the Federal Government.[13] (Emphasis added.)

To enforce these determinations of federal personnel, all executive departments and agencies involved are authorized to:

> (a) cancel or terminate in whole or in part any agreement or contract with such person, firm, or State or local public agency providing for a loan, grant, contribution, or other Federal aid, or for the payment of a commission or fee;
>
> (b) refrain from extending any further aid under any program administered by it and affected by this order until it is satisfied that the affected person, firm, or State or local public agency will comply with the rules, regulations, and procedures issued or adopted pursuant to this order, and any nondiscrimination provisions included in any agreement or contract;
>
> (c) refuse to approve a lending institution or any other lender as a beneficiary under any program administered by it which is affected by this order or revoke such approval if previously given.[14]

In addition the Attorney General is authorized to institute civil or criminal proceedings in case of "violations of any rules, regulations or procedures."[15]

The strong dissent filed to Recommendation No. 3 concerning housing by Honorable Robert G. Storey, Vice Chairman of the Com-

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[13]Exec. Order No. 11,063, 27 Fed. Reg. 11525, 11527 (1962).

[14]Exec. Order No. 11,063, 27 Fed. Reg. 11525, 11528 (1962).

[15]Exec. Order No. 11,063, 27 Fed. Reg. 11525, 11529 (1962).

mission on Civil Rights, former President of the American Bar Association and head of the Southwestern Legal Center in Dallas, Texas, is a masterful statement of the situation faced by the American people today. Such Recommendation No. 3 appears on page 75 and is as follows:

> That the Federal Government, either by executive or by congressional action, take appropriate measures to require all financial institutions engaged in a mortgage loan business that are supervised by a Federal agency to conduct such business on a nondiscriminatory basis, and to direct all relevant Federal agencies to devise reasonable and effective implementing procedures.[16]

While this dissent is specifically limited by Mr. Storey to Recommendations No. 3 in the field of housing, in my opinion it applies to the entire massive effort of the federal government under the cloak of civil rights to gain control of all five areas of housing, employment, education, voting and justice encompassed in the Commission's report. Mr. Storey's dissent appears on pages 75 and 76 and is in part as follows:

> While I am fully agreed that it is not in keeping with American principles that a person be denied a housing mortgage loan solely on the basis of his race, religion, or national origin, I am, nevertheless, very much opposed to further intervention by the Federal Government into the affairs and policies of private financial institutions. It is important to recognize that under democratic capitalism there must be a realm of institutional autonomy. Private financial institutions, even where their activities are in part already regulated by the Federal Government, are *primarily business institutions and not institutions for social reform* . . . .
>
> What constitutes the appropriate sphere of governmental intervention in private institutional financial policies may be a relative matter, but some separation must be kept between political, social, and economic affairs. *Every increase in Federal supervision of the economic life of the Nation for the purpose of achieving certain specific social objectives automatically diminishes the function that the free competitive market discharges under democratic capitalism. In the long run, this can lead only to autocracy.*
>
> *Recommendations, such as this, for increasing Federal control assume a totally powerful National Government with unending authority to intervene in all private affairs among men, and to control and adjust property relationships in accordance with the judgment of Government personnel.* It is at this level that a more serious and obvious weakness arises, for political employees are seldom absolutely objective. It is impossible to keep Federal intervention from becoming an institutionalization of special privilege for political pressure groups. This must lead

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[16] 6 CIVIL RIGHTS 75.

> eventually not to greater human freedom but to ever-diminishing freedom.
>
> Therefore, a great deal of caution is needed before succumbing to the politically tempting suggestion of resorting to the Federal Government for increased control. Reliance on the Federal Government for the solution of all problems of discrimination can bring about only a weakening of confidence in the capacity of the institutions of a free economy to serve democratic values. I am firmly of the belief that in the majority of instances a free economy is better able than the Federal Government to work out fairly the problem of discrimination in mortgage loans. This, in turn, will halt the tendency to skrink freedom of private enterprise to smaller dimensions.
>
> *The issue here is much more than the technical problem of devising new controls to deal with financing minority housing. It is the issue of freedom versus authority. The success of a democratic free enterprise economy depends as much on what the Federal Government does not do, or does not have to do, as on what it does.*[17] (Emphasis added.)

Do we now live under a government of laws or a government of men? How far will the executive department go in taking over legislative functions? Congress has repeatedly refused to require racial integration in federal housing. It has never granted that authority to the President. Yet President Kennedy issued Executive Order 11,063 without legislative authority and in the face of repeated Congressional denial thereof.

On April 21, 1949, Senator Bricker offered an amendment to the pending Housing Act of 1949, to provide for integration in public housing, which was defeated.[18]

In 1953, Representative Franklin D. Roosevelt, Jr., offered an amendment that would require written certificates in Title I home improvement loans that the rental, occupancy, use, lease, purchase, or sale of the property (including land) involved should in no way be limited on account of race, color, or origin. This amendment was rejected.[19]

In 1954, Representative Javits (now Senator Javits) introduced an amendment requiring the FHA Commissioner to issue regulations to assure the needs of minority groups in housing without racial discrimination. This amendment was defeated 110 to 87.[20]

Representative Adam Clayton Powell of New York has on several occasions introduced amendments prohibiting racial descrimination in all housing programs. In 1954, his amendment was defeated 113 to 74.[21]

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[17] *Ibid.*

[18] 95 CONG. REC. 4861 (1949).

[19] 99 CONG. REC. 1429 (1953).

[20] 100 CONG. REC. 4488 (1954).

[21] *Ibid.*

In 1959, his amendment was rejected 138 to 48.[22] The day following this action, Representative Baldwin of California attempted to insert in the public housing provisions of the Herlong Bill an amendment stating that "there shall be no discrimination against any individual on account of his race, creed, or color." This amendment was defeated 205 to 115.[23]

The analysis inserted into the Congressional Record by the Chairman of the Subcommittee on Housing of the Committee on Banking and Currency of the United States Senate[24] discusses fully the effect of such legislative history upon later executive action:

> The celebrated steel seizure case[25] is still vividly in the legal mind. Here, in seizing the steel mills, the President advanced a theory not unlike the Theodore Roosevelt theory of a broad Executive residuum of power.
>
> In the steel seizure case the President seized the steel mills by executive order, and the courts in a declaratory judgment and injunction suit, dissolved his seizure. The fact that Congress had refused to authorize governmental seizures of property to settle labor disputes had a bearing on the opinions of both the trial court and the Supreme Court. An appropriate quotation from the Supreme Court's opinion follows:[26]
>
> "The President's power, if any, to issue the order must stem from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Moreover, the use of the seizure technique to solve labor disputes was not only unauthorized by a Congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency."
>
> Mr. Justice Jackson in this case analyzed the powers of the President and placed them in three categories; namely, maximum, "twilight zone," and minimum. When Congress authorizes the President to act, his powers are at a maximum. When Congress has been silent the President is at neither maximum nor minimum as to power but is in the "twilight zone." However, when Congress has expressed a will or when there is an implied will, the President's powers are at a minimum. "Courts can

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[22] 105 CONG. REC. 8654 (1959).

[23] 105 CONG. REC. 8833 (1959).

[24] 108 CONG. REC. 21681 (1962).

[25] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See also CORWIN, THE PRESIDENT: OFFICE AND POWERS (1950). *Cf.* TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-40 (1916).

[26] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

> sustain exclusive Presidential control in such a case only by disabling the Congress from acting on the subject," the Court stated.[27]

In the face of this adverse legislative history, Executive Order 11,063 was issued on November 20. The result desired must be brought about within the time desired. "The end justifies the means."

IV. Will Our Free Enterprise System Remain Free?

A man's home is closest to his heart. In our society a man's business is next in importance. Our free enterprise system requires some governmental control of business activities. When control is limited to that necessary to maintain a proper balance in the economic affairs of men, it is not only desirable but necessary. This is neither the time nor the place to discuss the position of the federal government and state governments in relation to public health, morals and safety as affected by the carrying on of professional, business, and industrial activities nor to discuss the extent to which regulation should be maintained by the federal government as against the state and local governments. What concerns us this evening is whether federal financial power should be used to obtain the political, sociological, and related ends desired by the political party then in power.

The Commission on Civil Rights recommends procedures supported by civil and criminal penalties for the manipulation, control, and regimentation of employment at the level of the employer and employee by federal personnel under the direction and control of the political party then in power. On pages 59 to 62 appear the recommendations concerning labor organizations, employers, employment, and training and recruitment which include the establishment of a federal agency to police and control employment created or supported by "government contracts and federal grant funds," "all federally assisted training programs and recruitment services" and "membership in and activities of labor organizations affecting equal employment opportunity on terms and conditions of employment with employers operating under government contracts or federal grants-in-aid"; the issuance of an executive order concerning "employment supported by federal grant funds"; supervision and regimentation of all existing programs of federal assistance to vocational education and apprenticeship training, retraining for government workers, admission to vocational classes; the setting up of employment opportunities for youth "and particularly minority group youth" through "a system of federally subsidized employment and training with special placement services"; further extension of a supervision of government contractors; a "change in the method utilized to determine federal appropriations to state employment offices" and setting up

[27] *Id.* at 637-38

regulations and statments of policies with respect to the operation of state employment offices, re-examination thereof; that the Secretary of Labor be instructed "to grant federal funds for the operation of state employment offices" only if their activities in this area meet the approval of federal personnel in the Labor Department and finally that "the Labor-Management Reporting and Disclosure Act of 1959 include in Title I thereof a provision that *no labor organization* shall refuse membership to, segregate, or expel any person because of race, color, religion, or national origin."[28]

Of course, while a thread of federal financing or relationship runs through these recommendations, the next presently undisclosed step would be to apply such civil regimentation and federal regulation to all employers and employees engaged in interstate commerce. The end is not yet. I repeat the words of the Commission, "Currently, the Commission has made a number of recommendations for federal action but these by no means exhaust the needs or possibilities for improvement."[29]

We may be sure that history will repeat itself. Once the pattern is established in the field of race, that pattern will be extended to all fields in which the political party then in power deems action to be politically expedient, sociologically desirable or consonant with its conception of the regulation of business by government.

The recommendations of the Commission should be considered in their relation to decisions by the Supreme Court of the United States whereby the liberties of individuals are being subjected to the supervision, regulation and regimentation of the federal government. We must not overlook proposed actions in the judicial field appearing in dissenting opinions of Justices of the Supreme Court. The proposals result from the theory of "state action" whereby actions of individuals are held, under constantly expanding concepts, to amount to "state action." I have already commented upon the distinction between state action and individual action recognized in the *Civil Rights Cases,* and the *Burton* case. In recent years we have observed an extensive expansion of federal jurisdiction and power as a development of the doctrine that when state action and private actions are said to be linked the result constitutes "state action" under the "instrumentality doctrine." Under this line of reasoning if an individual or private organization has certain contacts with the state or any of its agencies, the individual or organization is considered an instrumentality of the state, subject to the restrictions of the fourteenth amendment.

Without question the most drastic expansion of the state action concept came in 1948 with the decision in *Shelley v. Kraemer,*[30] which

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[28] 6 CIVIL RIGHTS 59-62.

[29] *Id.* at 97.

[30] 334 U.S. 1 (1948).

made illegal a judicial enforcement of the private restrictive covenants contained in the deed conveying real property there involved. While the case involved racial restrictions, nevertheless, if such principle were to be expanded and extended, it would include any element of "equality of treatment" deemed by the court to be "implicit in the concept of ordered liberty."[31] This decision has been construed by many to hold that when a private individual merely invokes judicial assistance by a state court, the enforcement of his private rights by the court is subject to the full range of restrictions applicable to the states as a result of the fourteenth amendment. While it is doubtful that the *Shelley* case went so far, nevertheless, this is a danger we must face.

This danger is pointed up by the dissenting opinion of Mr. Justice Douglas in *Black v. Cutter Laboratories*, which said: "Once the courts have put their imprimatur on such a contract, government, speaking through its judicial branch, acts."[32]

The possibilities presented here, in the event this should become the majority view, are frightening. It is conceivable that every time a state court interpreted a contract, its decision would be subject to review by a federal court in order to determine whether the contract as construed by the state denies either of the contracting parties due process or equal protection of the laws. Under the broad interpretations placed on those two clauses by the federal courts, the power of the federal judiciary in this area of personal relations would be enormous. As Professor Fairman of the Harvard Law School points out: "By extending the doctrine of Shelley and Barrows to any case in which a state court is 'implicated,' the minority position would impose a severe limitation upon private contractual freedom in the guise of restricting state action under the Fourteenth Amendment."

The danger which hangs over civil liberties (our homes, our businesses and education of our children—all those things which make up life, liberty and the pursuit of happiness) is accentuated by the concurring opinion of Mr. Justice Douglas in the case of *Garner v. Louisiana*,[33] which fortunately has not been adopted by a majority of the Court. This case involved the right of the owner of a restaurant to carry on the business of that restaurant and the extent to which he was subject to federal supervision and regimentation. Other questions are also involved including whether or not the defendants were guilty of disturbing the peace. The Supreme Court reversed the judgment, holding that the "records contain no evidence to support the finding that petitioners disturbed the peace." Mr. Justice Douglas would have reversed it on other grounds. The restaurants involved, he argued, were enforcing a

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[31] *Id.* at 23.

[32] 351 U.S. 292 (1956).

[33] 368 U.S. 157 (1961).

state-sanctioned policy, and the fact that they were normally felt to be private businesses made little difference in these matters. They were licensed and regulated by the state, and, according to Mr. Justice Douglas, could be considered a form of private property affected with a public interest. They enjoy "a privilege that derived from the people," and thus must comply with the "overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group."[34]

Given the line of reasoning adhered to by Mr. Justice Douglas here, it would seem that every individual licensed by the state to carry on a business or profession and every entity created under the laws of the state becomes, by virtue of this fact, an agent, *i.e.*, instrumentality, of the state and thus subject to the limitations of the fourteenth amendment as interpreted by the Supreme Court. The actions of the doctor, the lawyer, the real estate agent, all of whom could not practice a profession or carry on a business without being licensed by the state, would constitute state action. An individual who pays a privilege tax for the right to carry on any business would become subject to such supervision, for these actions could not have been performed without the state's having given its initial blessing to them. Every act by a private corporation organized under and existing by virtue of a state statute would become "state action" and thus subject to civil regimentation. I am confident that the Court will not expand the doctrine this far, but we should be alert to these possibilities.

We must realize that when executive, legislative, and judicial actions combine all the power of government is invoked to bring about the ends which may be desired.

V. Regimentation of Our Children

Until 1954 the education of the children of the United States had been recognized as being entrusted to local and state authorities by decisions rendered both before and after the adoption of the fourteenth amendment. Since the decision in *Brown v. Board of Education*,[35] the federal courts have taken over the administration of public schools in the United States insofar as the racial integration thereof is concerned. The problem vital to each citizen of the United States is the extent of the federal take-over in the coming months and years by executive, legislative or judicial action.

The ultimate result to be consummated should the program recommended by the Commission be approved is clearly set forth in a statement by the Commission on page 48 which "lets the cat out of the bag."

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[34] *Id.* at 185.

[35] 347 U.S. 483 (1954).

Of course, it is stated in the negative, but should be translated in the affirmative, such statement being as follows:

> The Commission agrees that in any such federal action taken it should be stipulated that no federal agency or official shall be given power to *direct, supervise or control the administration, curricula or personnel of an institution operated and maintained by a state or a political subdivision thereof.*[36] (Emphasis added.)

The implication is apparent. Without such stipulation federal power would be exercised. *Voluntary limitation upon federal power by federal personnel is unknown to this generation.* In the words of Hamlet, "The lady doth protest too much, methinks."

The Commission's Report states recommendations which would ultimately result in the federal government's taking over most of the administration of the public schools of the states. These recommendations include: federal supervision of every local school board by designated federal agency requiring each such board to file a plan for integration and to subject itself to supervision by such agency; that "any and all federal grants-in-aid to the various states for education programs in elementary and secondary schools be allocated" so that those schools which are not operated "on a non-discriminatory basis" as determined by federal personnel lose 50 per cent of all such federal grants-in-aid; that the procedures in the Courts for the trial of cases should be changed so that the procedures which now constitute due process of law in all similar cases would not apply to cases involving integration of education institutions, but a streamlined and expedited method of procedure would be set up for such cases; that employees paid on a 50-50 matching basis (and thus subject to federal control) should be furnished to school districts, citizens, groups or local school systems to bring about integration in those schools—all of which being translated means that federal personnel should supervise, direct and manage school systems, school districts and citizens' groups in this particular area of race which has been chosen for activity within the broad field of "civil rights." When other areas would be added is unknown and unknowable.[37]

It is recommended that federal teams be set up to "mediate and conciliate" between school officials and school patrons thereby extending federal control by "mediation and conciliation"; that federal personnel (presumably able bodied and strong armed) be provided as bodyguards of school board members and supervisory officials and teachers to protect them "from bodily harm, harrassment, intimidation, and/or reprisal by officials or private persons"; that federal public schools be set up for military personnel under certain described circumstances; that federal employees investigate all public libraries receiving financial aid

[36] 6 CIVIL RIGHTS 48.

[37] *Id.* at 45-49.

under the Library Services Act of 1956; that when federal personnel dislikes the practice of such library, federal funds should be withheld; that a program of federal scholarships be set up to be used in this area; that federal supervisory and investigative methods be set up "to assure that funds under the various programs of federal assistance to higher education be disbursed only to those publicly-owned institutions of higher education" whose procedures in this area meet the approval of federal personnel; that there be a federal investigation (the investigators are not referred to as secret police) of all school districts, all individual schools and all individual institutions of higher learning within each state to obtain facts which the Commission feels would be of use to it in its objectives, *i.e.*, federal regimentation, supervision, and direction of education in the United States.[38]

It is interesting to observe that at the bottom of page 48 in referring to the control through financing of higher education in publicly owned institutions of higher education, it is said, "Four Commissioners believe, however, that as a matter of sound policy the same principle should be extended to privately controlled institutions."[39]

The end is not yet. Again I quote from the report the explanatory sentence: "Currently, the Commission has made a number of recommendations for Federal action, but these by no means exhaust the needs and possibilities for improvement."[40]

VI. Fedfral Control and Administration of Voting

One of the first steps of those seeking autocratic power is to gain control of the electoral machinery of a democracy. The Constitution of the United States wisely left this control in the hands of the states. The extent of the destruction of the rights of the states and the expansion of federal power contemplated by the Commission is illustrated by the recommendations on pages 21-24 whereby the federal government would take over all material matters having to do with voting in both state and federal elections. These recommendations are not limited to matters involving race. The Commission would destroy the right of the states to provide for election of its own officials and the officials of its local subdivisions, which right has been recognized and exercised since the Constitution of the United States was adopted.

Time will not permit itemization of all the recommendations of the Commission but I will give you what I believe to be a reasonable construction of the effect and intent of such recommendations. Recommendations 1 through 5 appearing on pages 21-24 are that the Congress should take over by federal statute the fixing of all voter qualifications

[38] *Ibid.*

[39] *Id.* at 48.

[40] *Id.* at 97.

in federal and state elections, thereby invalidating all state constitutional provisions and state statutes; that the federal government take over the regulation and supervision of registration of voters, the holding of elections and the counting of votes; the establishment of voting districts and electoral districts for state and federal elections; that federal criminal statutes should be enacted which might be used to prosecute anyone (particularly state and local officials) who, in the opinion of federal personnel, are guilty of "any arbitrary action or (where there is a duty to act) arbitrary inaction" in the area of registration, voting, and counting votes in any federal election.

As to Recommendation No. 1, Vice-Chairman Storey dissented as follows:

> Proposals to alter long standing Federal-State relationships such as that incorporated in the Federal Constitution, declaring that the qualifications of electors shall be left to the several States, should not be made unless there is no alternative method to correct an existing evil. Such is not the case today . . . .
>
> Many states have voting requirements more extensive than age or length of residence, incarceration, or felony convictions. These qualifications, having nothing to do with race, religion, or national origin, are an important element in preserving the sanctity of the ballot. They are specific disqualifications which are felt justifiable for the good of the State.
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> As to the Recommendation No. 1, Commissioner Rankin dissented saying:
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> The 15th amendment has been a part of our Constitution for almost a century, and Congress has never interpreted it as a mandate to usurp the power of each State to determine the qualifications of electors.[41]

A moment's reflection will disclose that each time we turn to another subject treated by the Commission, we find that a bulwark of our freedom will be destroyed.

VII. Federal Control of State Courts in All Criminal Proceedings

State control of the administration of criminal law is currently being threatened by an ever-expanding system of federal control. If the trend is not soon halted, the subject will pass entirely from state control to federal domination. State criminal law is fast becoming a mere appendage of federal constitutional law. Nothing more than a matter of phraseology suffices to raise the minutiae of the state criminal law to the level of federal constitutional law, bringing in the whole paraphernalia of federal review and control.

The present danger is that all crimes will become federal crimes,

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[41] *Id.* at 21-24.

all police will become federal police, and all the institutions of punishment and rehabilitation will become federal. In short, the entire machinery of the administration of the criminal law will be concentrated in the hands of an over-powering federal government—precisely the danger the federal constitution was designed to prevent, by means of a system of checks and balances and division of responsibilities and power between the federal and the state governments.

The nation is now faced with the culmination and coalescence of several separate doctrines that have been developing for about a century and a half. Singly, at least in their origins, none seemed to pose any serious threat. But collectively, particularly as a result of a burgeoning growth in a favorable federal judicial climate, these developments pose an almost overwhelming threat to the states.

There are four principal procedural techniques at present available for the complete supersession by the federal government of continued state control of the administration of criminal justice. Three of these techniques are judicial and one is legislative and executive. The three judicial techniques are as follows: (1) the United States Supreme Court, by direct appellate review, re-examines state criminal trial proceedings within a scope which is expanding from month to month; (2) the federal judiciary, initially at the district court level, through the mechanism of federal habeas corpus, indirectly reviews and retries state criminal cases after they have been determined by the highest appellate court of the state; (3) in trials in the federal courts under the Civil Rights Act, state officials charged with responsibility for administration of the criminal law are required to give an accounting of their stewardship to federal judges and may be sued by defendants in federal courts, even though ample remedies are available in state courts.

The legislative and executive technique involves an ever-expanding federal criminal jurisprudence, through the creation of new federal crimes, enforced by federal police, prosecuted by federal prosecutors, adjudicated by federal judges, and punished in federal institutions. This expansion has heretofore been based primarily on the power of Congress to regulate interstate commerce, a power which, through fictions and specious reasoning, has been carried into areas entirely foreign to its original purpose. It is abetted by forced construction of the "due process" and "equal protection" clauses of the fourteenth amendment utilized as a basis of upholding new federal crimes being created from time to time under the Civil Rights Act. The recommendations of the Commission appearing on pages 86 and 87 would extend this federal take-over much farther than has ever been heretofore contemplated.[42]

The recommendation under which the federal take-over would be

[42] *Id.* at 86-87.

complete, from the first telephone call when a citizen complains to the police to the final release from custody of the criminal appears on page 86 of the Report as follows:

> Recommendation 2. That Congress consider the advisability of enacting a companion provision to section 242 of the United States *Criminal* Code which would make the penalties of that statute applicable to those who *maliciously perform, under color of law, certain described acts* including the following:
> (1) *subjecting any person to physical injury for an unlawful purpose*:
> (2) subjecting any person to *unnecessary force during the course of an arrest* or while the person is being held in custody;
> (3) subjecting any person to *violence or unlawful restraint* in the course of *eliciting a confession* to a crime or any other information;
> (4) subjecting any person to violence or unlawful restraint for the purpose of obtaining anything of value:
> (5) *refusing to provide protection to any person* from unlawful violence at the hands of private persons, knowing that such violence was planned or was then taking place;
> (6) *Aiding or assisting private persons in any way to carry out acts of unlawful violence.*[43] (Emphasis added.)

All of the above duties of state and local law enforcement officers presently exist under state law. The change recommended is to amend the Constitution by indirection to transfer supervision, control and possible penalization of state law enforcement officers from the states to the federal government. Federal personnel would decide whether the acts described had been performed by the state officer, whether the acts were "malicious," and whether prosecution should be instituted. Every state law enforcement officer would be a prospective federal criminal.

Among other recommendations is included the setting up of a program of "grants-in-aid to assist state and local governments, upon their request, to increase the professional quality of their police forces."[44] (The only recommendations made by the Commission as to grants-in-aid programs clearly demonstrate the federal control expected to be obtained by such programs and the conditions which would be attached thereto.)

The Commission also recommends that a federal cause of action be given against any county government, city government or local government entity that employs officers who deprive persons of rights protected by Section 1983 of Title 42 of the United States Code and makes such governmental entities jointly liable with the officers who may do so.[45] It

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[43] *Id.* at 86.

[44] *Id.* at 86-87.

[45] *Ibid.*

is difficult to imagine the Pandora's Box of litigation the Commission would open by this recommendation. Not only state officers, but counties, cities and all local government entities would be sued endlessly by persons arrested and accused of crime. Law enforcement would be crippled in the name of civil rights.

VIII. Conclusion

Although the 1961 Report of the United States Commission on Civil Rights contains thirty-seven controversial recommendations, it raises one paramount issue to which the people of the United States must be alerted and which they must face squarely and courageously. The federal government expends directly $90 billion per year through its budget; it supervises and controls private and semi-public financial institutions with assets of $890 billion (see page 65 of the Report) through seventy grant-in-aid programs; it dictates the use of approximately one-fourth of the taxes collected and expended by all of the states. As of November 20, 1962, the first major step was taken to pervert this vast financial power to political purposes through Executive Order 11,063.

The burning issue in the field of civil rights today is whether the American people will permit the executive branch of the federal government to pervert to political purposes this vast power in the federal financing of homes, schools, corporations and individuals' business (and eventually the subsidizing of persons by social security, unemployment compensation, veterans' and pension benefits) to bring about the political and sociological ends desired by the political parties then in power. Reasonable business conditions placed upon financing related to the purposes thereof are proper and necessary. Once the people of the United States permit the executive head of the political party then in power to pervert and misuse this financial power for political purposes, all those things which go to make up what we still fondly call our "free enterprise system" will become subject to despotic action of federal personnel.

After careful consideration and a full study of all six volumes of the 1961 United States Commission on Civil Rights Report, I charge that this Report was prepared and distributed to the people of the United States for the purpose of deliberately deceiving them by using the pretense of an objective study to present only those facts favorable to the desires of the political party and the pressure groups supporting this program. It was planned to conceal from the people of the United States all facts which do not support the political positions thus espoused. Volume 2 on Education contains 254 pages. The only schools in which massive integration has been accomplished are the schools of

the District of Columbia. Integration of these schools was hailed as a noble experiment which would prove to the nation the feasibility, desirability and wonderful effect of integration of school systems. This noble experiment has miserably failed. The condition in the schools of the District of Columbia has gone from bad to worse. I wish I had time to discuss in detail this failure. When the Commission's 1961 Report was prepared, full information was available of that which had occurred in the integration of the schools in the District of Columbia. Yet there is no mention of such schools. All facts are suppressed concerning the same. There is a 254-page detailed discussion of every state in which partial integration has been accomplished. Not one page gives the facts concerning the integration of the schools in the District of Columbia. Since the preparation of the Report, there erupted in the District of Columbia at a football game one of the worst race riots in the history of the United States, in which 346 people were injured. This accentuates the deliberate suppression of facts by the Commission.

The issue does not stop with the usurpation of power by the executive. The February 28 message of President Kennedy to Congress dramatizes the parallel issue of whether Congress will, in the future, approve such arbitrary use of federal financial power to attain political ends. The ultimate problem is whether the federal government shall be permitted to destroy the power of the states and local governments and to regiment individuals by forcing all to follow the behest of federal personnel under the threat of civil and criminal penalties.

The guiding principle of our federal system, the distinction between local and national affairs, was reiterated in a Report of the Conference of Chief Justices in August, 1958. I quote from that Report: "The difference between matters primarily local and matters primarily national was the *guiding principle* upon which the framers of our national Constitution acted in outlining the division of power between the national and state governments." This "guiding principle" must be considered as one of the principles to which Chief Justice Marshall referred in *Marbury v. Madison*, when he said:

> That people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.
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> This original and supreme will organizes the government, and assigns to different departments their respective powers. It may

> either stop here or establish certain limits not to be transcended by those departments . . . .
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> *To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?*[46] (Emphasis added.)

This "guiding principle," the preservation of the distinction between matters local and national, can also be considered as an epitome of the tenth amendment which, at the risk of being considered old-fashioned, I now quote: "The powers not delegated to the United States by the Constitution or prohibited by it to the States, are reserved to the States respectively, or to the people."[47]

In the words of the late Mr. Justice Jackson:

> I know that it is now regarded as more or less provincial and reactionary to cite the Tenth Amendment, ... That Amendment is rarely mentioned in judicial opinions, rarely cited in argument. But our forefathers made it a part of the Bill of Rights in order to retain in the localities certain powers and not to allow them to drift into centralized hands. Perhaps the Tenth Amendment is drifting into oblivion . . . .

In recent years, the Court, speaking through Mr. Justice Frankfurter, in *Polish Alliance v. Labor Board*, warned and I quote:

> The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity.[48]

Turning from the problem of government affecting every phase of human existence to the specific problem of race, there is one monumental error which is the cornerstone of the recommendations of the Commission on Civil Rights affecting race. This error is also the foundation of the actions of those who lead the political, religious, sociological and propaganda pressure parade in the field of race. That monumental error is the assumption that the mixture by force of Negroes and white persons through religious, political, economic, judicial and military pressure will solve the problems of racial relationships in the United States. That error has led to turmoil, distress, disappointment and frustration in northern cities and in southern communities. Unless corrected, it may lead to disaster.

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[46] 5 U.S. (1 Cranch) 137 (1803).

[47] U.S. CONST. amend. X.

[48] 322 U.S. 643, 650 (1944).

Race preference and race pride upon the part of both of the two great races which live side by side in the United States (constantly referred to as "race prejudice" and "race discrimination") cannot be removed by force, regardless of the nature of that force. Race pride and race preference, a recognition of basic and inherent fundamental differences between the races, is not a matter of prejudice, it is simply a recognition of the facts of life. It should not be removed by any means. Christian love and brotherhood, equality of treatment before the law, cordial human business and political relationships can be carried on within the framework of reasonable segregation as well as within the framework of reasonable integration. There is no uniform pattern best for every community in the United States.